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IN THE

Supreme Court of the United States

October Term 1972

No. 72–1737

Board of Education of Prince George's County, *et al.*,
Petitioners

v.

Sylvester J. Vaughns, Jr., *et al.*,
Respondents

v.

Jesse Alexander Eller, *et al.*, *Intervenors*
Respondents

RESPONDENTS' ELLER, ET AL., BRIEF IN SUPPORT OF PETITIONERS', BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

Jesse Alexander Eller, *et al.*, on behalf of themselves, school age children, and other citizens of Prince George's County, Maryland, similarly situated, hereby, through their attorneys of record, submit this Brief in Support of the Petition for Writ of Certiorari for consideration by this Court in accordance with Rule 24 of this Court.

The Following page references are used herein:

Petitioners' Board of Education of Prince George's County, *et al*, *Petition for Writ of Certiorari* . . . . . (PWC 1-25)

Appendix Included . . . . . .(PWC 1a-62a)

Joint Appendix on Appeal filed in the United States Court of Appeals for the Fourth Circuit . . . . . .(JA 1a-337a)

Appendix to this Brief in Support, Separately Bound . . . . . (1a-88a)

The Board of Education of Prince George's County, Maryland, *et al.*, petitioned this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in the instant case entered on January 23, 1973.[1] A previous order was entered by the

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[1]The United States Court of Appeals for the Fourth Circuit has not rendered its written opinion as of the date of the printing of this brief in support. By letter of March 20, 1973, the Honorable Chief Judge Clement F. Haynsworth, Jr., writing to Paul M. Nussbaum, attorney for the Prince George's County Board of Education stated:

> "I do intend, to file a written opinion in the Prince George's County case. It would have been filed long since if I had not come down with the flu and suffered a subsequent relapse. I cannot tell you exactly when it will be filed, for any opinion can provoke somewhat extensive discussion, special concurrences and so forth. I hope it will not be long delayed, but I suggest that it would be expedient for you to plan now to file your petition to the Supreme Court without it, filing copies of the opinion itself as a later supplement."

Fourth Circuit on October 12, 1972.[2] Respondents Eller, *et al.*, have also filed a petition for writ of certiorari stemming out of the same proceedings below and dockected in this Court on April 20, 1973 as No. 72–1428.

OPINIONS BELOW

The opinions of the Court below directly proceeding this petition are as follows:[3]

1. Judgment and Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, 1024 Affirming District Court Decision, dated January 23, 1973. . . . . page 1a

2. Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, Granting and Denying Amicus Curiae Standing, dated January 19, 1973. . . . . page 7a

3. Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, 1024, Postponing Stay, dated January 10, 1973. . . . . page 9a

4. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated December 29, 1972, Implementing Student Transfers and Busing Plan. . . page 11a

5. Court Memorandum of United States District Court for the District of Maryland, Civil No. 72-375-K, dated December 13, 1972, Implementing Order. . . . . page 33a

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[2]This case has been before this Court once before, as Case No. 72-799-CFX. On November 30, 1972, petitioners petitioned the Court for a Writ of Certiorari based upon the District Court Order dated July 25, 1972 and August 21, 1972. The Court of Appeals for the Fourth Circuit held the issues not to be ripe for review on October 12, 1972. Respondents replied in this Court on January 2, 1973. Said petition was denied by this Court on January 22, 1973.

[3]The appendices include all opinions below and are printed in the second volume because of size. Reference is denoted page 1a through page 88a.

6. Order of United States Court of Appeals for the Fourth Circuit, Case No. 72-2129, 2130, 2131, dated October 12, 1972, Interlocutory Appeal. . . . . page 46a

7. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated August 31, 1972 Implementing Order. . . . . page 52a

8. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated July 25, 1972, Granting Plaintiff's Motion for Summary Judgment. . . . . page 64a

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10. Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated September 19, 1972, Granting Petitioner's Motion to Intervene. . . . . page 72a

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 23, 1973 (pages 1a-2a). Jurisdiction of this Court is invoked under Article III, Section II of the Constitution of the United States and 28 USC 1245 (1) and Public Law 92-318 Title VIII § § 803, 804, 806.

FEDERAL QUESTIONS PRESENTED

1. In a state action suit on school desegration can a Federal District Court issue a partial summary judgment declaring a county school system to be operating a dual school system and not a unified school system? (PWC 8).

2. Was it intended by this Court that *Brown II, Swann* and *Keyes* would establish that *racial-ratios* were the single standard by which a Federal District Court would determine that a county school system was or was not operating a dual school system?

3. In a state action suit on school desegregation, can a Federal District Court render a decision that a county school system is operating a *de jure* segregated school system, notwithstanding the want of necessary parties defendants also responsible under state and federal laws?

4. In a state action suit on school desegregation, can a Federal District Court render a decision approving a plan for pupil assignments which has been based solely on *black-white* pupil ratios contrary to this Court's holdings in *Swann* and *Keyes?*

STATUTES INVOLVED

P.L. 92-318 (LAWS OF 92nd CONG. -2nd SESS. June 23, 1972)

TITLE VIII–GENERAL PROVISIONS RELATING TO THE ASSIGNMENT OR TRANSPORTATION OF STUDENTS

PROHIBITION AGAINST ASSIGNMENT OR TRANSPORTATION OF STUDENTS TO OVERCOME RACIAL IMBALANCE

PROVISION RELATING TO COURT APPEALS

Section 803. Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of

such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

PROVISION AUTHORIZING INTERVENTION IN COURT ORDERS

Section 804. A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

PROVISION REQUIRING THAT RULES OF EVIDENCE BE UNIFORM

Section 805. The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

APPLICATION OF PROVISO OF SECTION 407(a) OF THE CIVIL RIGHTS ACT OF 1964 TO THE ENTIRE UNITED STATES

Section 806. The proviso of section 407(a) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by Title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the

residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

STATEMENT UNDER RULE 33(2)(b)

This proceeding draws into question the constitutionality of Public Law No. 92-318, Title VIII § § 803, 804, 805, 806, 86 Stat. 235, all as amended, which are acts of Congress affecting the public interest, and neither the United States, nor any agency, officer of employee thereof is a party, therefore it is noted that 28 USC § 2403 may be applicable.

STATEMENT OF THE CASE

Respondents Eller, *et al.*, seek review of a decision of the Court of Appeals (Exhibit A, p. 1a-6a) that refused to consider the substantive issues raised by respondents in challenging the lower Court's orders of July 25, 1972 (Exhibit H, p. 64a and Exhibit I, p. 65a-71a) and December 29, 1972, (Exhibit D, p. 11a-32a) wherein it concluded that unlawful segregation existed in the Prince George's County school system and a "Staff Plan" would be implemented. While the Court of Appeals (Exhibit F, p. 46a) recognized respondents' challenge of the orders, it nevertheless avoided responding to the merits of respondents' contentions and instead dealt soley with the issue of whether or not the lower Court's July 29, 1972 order, regarding the submission of plans for "desegregation, " was ripe for judicial review (p. 50a). Finding that it was not ripe on the July 29, 1972 Order, the Appeliate Court below remanded the full proceeding to the District Court (p. 51a). On the District Court Order of December 29, 1972 (p. 11a) the Court of Appeals affirmed the lower Court by mandate of January 23, 1973 (p. 1a, 2a). It is from both of the Appellate mandates dated January 23, 1973 and October 12, 1972 (p. 1a, 2a, 51a) that respondents ask this Court for certiorari.

Plaintiffs, Black citizens of Prince George's County, Maryland, filed a complaint alleging that the school system of Prince George's County did not meet constitutional standards

and thus deprived them, and citizens similarly situated, of the equal protection of the laws of this nation. The thrust of plaintiffs' complaint was that vestiges of the pre-*Brown I* dual school system had not been dismantled. To expedite consideration of their complaint, plaintiffs and defendants filed with the District Court a Joint Stipulation of Facts, which set forth, *inter alia,* certain statistical data pertaining to the racial composition of the schools within defendants' system.

Based solely on the content of the Joint Stipulation of Facts, (which was actually incomplete) the District Court granted Black plaintiffs' motion for summary judgment on July 25, 1972 (p. 64a). The Court found that there was a lack of desegregation in the schools that, " ...stems from a pre-*Brown I* segregated system which has never been effectively dismantled... " (p. 69a). Thereupon, the Court ordered the school Board to submit to it a desegregation plan that would conform to the constitutional criteria established by this Court in its *Brown I,*[4] *Brown II,*[5] and *Swann*[6] decisions.[7] The School Board, on a four-to-four vote refused to adopt a massive busing plan presented to it by its staff and instead submitted a report to the Court on its endeavors to comply with the Court's mandate (p. 31a).

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[4]*Brown v. Board of Education,* 347 U.S. 438, 74 S.Ct.686, 98 L.Ed.873 (1954).

[5]*Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct.753, 99 L.Ed.1083 (1955).

[6]*Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct.1267, 28 L.Ed.2d 554 (1971).

[7]That decision conflicts with the State Court's ruling that *de facto,* not *de jure,* segregation prevailed in the Prince George's County school system, since adoption by the School Board on November 11, 1969, of the desegregation plan which is presently in effect, *Eugene Borders, et al. v. Board of Education of Prince George's County, et al.,* 265 Md. 448, 290 A.2d 510 (1972).

Thereafter respondents filed their Motion to Intervene on August 23, 1972, (Exhibit K, p. 75-a 77-a) but the Court would not hear respondents' motion until September 8, 1972, thereby limiting the rights of intervenors and only effective as of September 1, 1972, (p. 72a-74a) which was after the July 25, 1972 order. The Court specifically prohibited and then continued to prohibit respondents from participating in the hearings following respondents' filing of its Motion to Intervene on August 23, 1972. Respondents were excluded from court hearings held on August 25, 28, 29, 30, 31, 1972, yet the transcript show respondents' counsel to be present. Respondents were not allowed to present evidence or to develop fully an evidentiary record, introduce expert evidence, use direct and cross-examination of witnesses and otherwise present evidence on the basic issue of the school system's compliance or noncompliance with constitutional standards. Further hearings were held on November 2, December 4, 7, 13, 26, 1972 attended by respondents' counsel, but the Court below would not permit counsel to properly represent his clients during the proceedings. The Court's ruling on basic issues was without benefit of certain relevant facts, and the District Court would not permit the taking of evidence in explanation of facts set forth in the Joint Stipulation - evidence that was crucial to a determination of causation of any racial imbalance and therefore, bearing directly upon the *de jure - de facto* issue.[8] The desegregation plan in effect on July 25, 1972 was instituted on November 11, 1969 and remained in effect until January 29, 1973; and was judicially determined to be consitutional and had suffered no change through legislation, state, county or otherwise.[9]

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[8]For Example, the fact that the Department of Health, Education and Welfare (H.E.W.) had ruled on November 19, 1969, that the school system of Prince George's County had met the requirements of Title VI of the Civil Rights Act of 1964 through its plans submitted for the desegregation of all elementary schools, of all secondary schools, and of the professional staffs of these schools was not presented to the Court.

[9]The Maryland Court of Appeals concluded that *de jure* segregation did not exist in the Prince George's County school system. *Borders et al. v. Board of Education of Prince George's County, et al.*, footnote 7, *supra*, page 8 . (1972)

The U. S. Court of Appeals for the Fourth Circuit in its decision in this instant case, ignored respondents' request to review the July 25, 1972 Order, or in the alternate, to require the record to be reopened on remand to permit respondents and others to introduce into evidence relevant and pertinent factual data on the *de facto - de jure* issue. Respondents preserved their objections on the record specifically for appellate review.[10]

This preservation of the record (Footnote 10) herein is a significant contribution made by respondents' counsel speaking on the record before Judge Kaufman. The use of in-chamber's proceedings was extensive and lacked court proceeding transcripts in derogation of the rights of all of the citizens of Prince George's County and most specifically those Anglo-Americans represented by Mr. Emmett H. Nanna, Jr. as respondent-intervenors' counsel. In-chambers proceedings when permitted by a Federal district court having jurisdiction over school desegregation suits, should require the presence of a court reporter for preservation of *all* of the record. Respondents also agree with the "Statement of the Case" as filed by the Petitioners Board of Education, *et al.* (PWC 4-7).

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

This case merits review on certiorari because it involves important legal questions which have been raised within the Federal Court System. The Lower Courts in implementing *Brown I*, *Brown II*, and more recently *Swann*, (Footnotes 4, 5,

[10]Mr. Nanna: First, Your Honor, I want to thank you for the opportunity you extended to me to participate in the discussion in Chambers where the staff plan was reviewed by the Court and by all counsel in this case. We do not endorse the final staff plan as being educationally sound, and we adopt the view taken by the Board in that matter, and * * * we do not agree that the implementation of the plan is necessary to bring the Prince George's County school system into compliance with the standards set out in *Brown* and *Swann*. But we have no objection to the admissibility of the plan.(Transcript of preceedingsbefore Judge Frank A. Kaufman on December 26, 1972 at page 18; Civil Case No. 72-325 K)

6, 7, p. 8, *supra*), have exceeded the constitutional limits and respondents, as Anglo-Americans designated as a class, now challenge *Brown II* and *Swann* and request this Court to hear on the merits and determine following oral arguments that substantive and procedural due process no longer exist for aggrieved school children and their parents. The major questions presented are due process in formulating specific desegregation goals through Black-White ratios and busing to achieve said goals, and the proper standard for Federal Appellate review of the methods used in achieving a unified school system. Federal courts throughout the country have issued decisions inconsistent among themselves and in violation of the United States Constitution. Unreported in-chambers proceedings should not be acceptable under due process, unless said proceedings are placed on the record at a later time in open court.

B. DEFINING LOWER COURT'S PARTIAL SUMMARY JUDGMENT ORDER AND OPINION

As a baseline for this Court's evaluation of Judge Kaufman's decision of July 25, 1972 (64a, 65a), all parties should analyze the facts and the law from a single point of reference. That point of reference is the lower Court's decision which established on the record that the Petitioners, Board of Education of Prince George's County, were operating a dual school system.

By order of July 25, 1972, the lower Court said,

> "For the reasons stated in this Court's opinion of even date herewith, *** the school system of Prince George's County does not, at the present time, meet the standards set forth in *** (*Brown I*) and *** (*Swann*)." (64a).

In its opinion the *only* reason given is *"racial-ratios"* of pupils based upon facts culled from the Joint Stipulation of Facts (JA 1a-337a) and no other evidentiary matter or law on issuing summary judgments (66a). Beginning at page 66a of the Opinion, line 8, and continuing to page 68a, line 3, the lower Court recites "The few highlights culled" (66a) on

black-white pupil ratios. The lower Court then states,

> "Against the agreed factual background in this case, defendants oppose plaintiffs' motion for summary judgment, asserting that the undisputed facts constitute 'mere conclusion' and that a factual dispute concerning 'causation' exists. But that dispute, to the extent it exists herein, is relevant not as to whether relief should be granted but rather as to what type of relief is required.
>
> "That conclusion is compelled by the command of *Brown I* and the implementation required by *Brown II*, as well as by the doctrine of *Green v. County School Board*, 391 U. S. 430 (1968), which Mr. Chief Justice Burger summarized in *Swann* (at 13) ****" (68a).

And continuing,

> "Those standards command a discontinuation of the current lack of desegregation in the schools of Prince George's County. That lack stems from a pre-*Brown I* segregated system which has never been effectively dismantled and which was not, in its origin, 'a consequence of other types of state action, without any discriminatory action by the school authorities' (*Swann* at 23) *** (69a).

C. THE SCHOOL SYSTEM FUNCTIONED UNDER A DESEGREGATION POLICY AND PLAN IN 1969.

If by stating that "*** system which has never been effectively dismantled" in 1969 or 1972, the lower Court meant that the Prince George's County School system had not made a "radical" change in its overall desegregation policy, then this is undoubtedly correct, for in 1969 and in 1972 the policy of the school board was a continuing effort at desegregation without requiring "shock treatment" to the citizens of the County. Continuing desegregation was required because

the influx of blacks from the District of Columbia was and is always increasing in the area surrounding the District of Columbia, requiring for example the model cities program funded by Congress. This the lower Court understood, but ignored its meaning although referencing the problem in the same paragraph of its decision (69a). Petitioners, Board of Education, *et al.*, uphold this position in their argument (PWC 14-15). The county school system moved from a pre-1954 *dual policy system* to a *freedom of choice policy system* to a *neutral assignment policy system*, which was functioning in 1972.

The judiciary through the orders and opinions of the United States District Court for the District of Maryland has seriously hurt and injured the majority of citizens in the County and will continue to do so through extensive unnecessary busing with the concomitant elimination of the community concepts of families, churches, small businesses and schools. The results of improper judicial holdings and misinterpretation of *Swann* by Judge Kaufman in violation of due process of laws are the harm and injury and sickness, as felt by the innocents and the non-participants in school desegregation issues. Anglo-Americans in support of their Board of Education are now speaking out and it is proper for this Court to timely hear and determine.

I

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT A UNITED STATES DISTRICT COURT CAN PROPERLY ISSUE A PARTIAL SUMMARY JUDGMENT BASED SOLELY UPON A JOINT STIPULATION OF FACTS FILED FOR THE PURPOSE OF EXPEDITING AN EVIDENTIARY HEARING, WHEN SUCH MOTION FOR SUMMARY JUDGMENT WAS OPPOSED BY BOTH ANSWER OF DEFENDANT AND ACCOMPANYING AFFIDAVITS IN SUPPORT OF SUCH OPPOSITION.

Respondents Eller, *et al.*, have stated as their Federal

Question 1 Presented at page 4, *supra*, the question of partial summary judgment being ordered in school desegregation cases. We ask that this question be also adopted for the Petitioners' Board of Education of Prince George's County, *et al.*, because in filing their petition, they failed to state anywhere in their brief a federal question. The federal question to have been presented is noticeably absent even from the index (PWC 1-25). Petitioners did not follow the rules of this Court, Rule 23(1)(c).[11]

Respondents Eller, *et al* adopt the Reason I argued by the Board of Education (PWC 8-24) as their own and submit the following in support thereof.

ARGUMENT IN SUPPORT OF PETITION

The law which has not been cited by the petitioners, but should be considered by this Court, establishes no clear cut doctrine, except that if there is a dispute on material facts of a constitutional significance then summary judgment is improper. The lower Court in the instant case acted outside that available law and was plainly in error. After diligent search of the record no single case on summary judgment in school desegregation has been found, but for *Soria*.

In *Soria et al., v. Oxnard School District Board of Trustees*, 328 F. Supp. 155, (D.C. Cal. 1971), that court held in a school desegregation case that the concerted action by school officials based upon improper considerations of race was not a question of fact material to the issue of the officials' constitutional accountability and was an issue appropriate for summary judgment. *Soria* is distinguishable from the instant case, in that in *Soria* the school board agreed that the *majority* of the Oxnard Elementary Public Schools were segregated in fact. This permitted the court to hold *de jure* segregation. In the instant case, the Board of Education never stated such and conversely stipulated to just the contrary that only four (4) schools remained segregated in fact (PWC 14). Further in *Soria*, the court held that *de jure overtones* (at 157) arose from such practices as open enrollment, placement of portable classrooms, failure to adopt pro-

[11]Stern and Gressman, *Supreme Court Practice*, Fourth Edition, 1969, BNA, Section 6.37 Content of "Questions Presented", page 297.

posed integregation plans and recision of resolutions to relocate portable classrooms. In the instant case, Judge Kaufman held only to *black-white pupil ratios.* See argument page 18, *infra.*

In *Soria, et al., v. Oxnard School District Board of Trustees, et al.*, 467 F.2d 59 (C.A. 9th Cir. 1972), the court did not review 328 F. Supp. 155, discussed above, but reviewed §803 of the Student Transportation Moritorium Act of 1972, page 5, *supra.* Application for stay of busing orders was denied because the order superceded the date of the Act and the Act did not have a retroactive clause.

In *Pitts v. Shell Oil Company*, 463 F.2d 331, (C.A. Miss. 1972) in a negligence action, the appellate court held "The question of who had the right of control is the ultimate issue in the case; it is a mixed question of law and fact" (at 334); and therefore summary judgment was an improper procedure in the court proceedings below. Similarily the Board of Education of Prince George's County did not have ultimate or exclusive control over the county school system. See argument, pages 25-27, *infra.*

In *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823, (D.C. Del. 1972) the court held in an action by a school secretary to be rehired that disputed factual issues cannot be resolved on summary judgment (at 836). See also *Boulware, et al., v. Battaglia, et al.*, 344 F. Supp. 889, (D.C. Del. 1972) in which defendant's motion for summary judgment was granted, but not until after extensive facts were accumulated and administrative hearings held regarding police corruption. (Citing *Hayes, supra.*)

In *Crystal City v. Del Monte Corporation*, 463 F. 2d 976, (C.A. 5th Cir. 1972) the appellate court reversed the lower court on issuing summary judgment (at 979, n.2) and said,

> We have held that summary judgment is proper only 'when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts, ****, while we

> intimate no opinion on the merits of the case, it is clear that the stipulated facts do not sustain the conclusion of the Trial Court **** The granting of a motion for summary judgment is the exception rather than the rule ****" (at 981).

The law of this case should be applied to Judge Kaufman's decision.

In *Batchelor, et al., v. Legg & Company, et al.*, 55 F.R.D. 557, (D.C. Md. 1972) the defendant Legg & Company moved for partial summary judgment against the plaintiff Batchelor in a stock fraud case. The United States District Court in Baltimore held:

> "Summary judgment under the Federal Rules of Civil Procedure, Rule 56, is to be used only in cases where there is no genuine dispute as to any material fact. *Chambers v. United States*, 357 F. 2d 224 (C.A. 8th Cir. 1966). Here we have a disputed unresolved issue of fact ****" (at 564).

Not only was there disputed facts in the instant case but also the school board already had a holding from the Maryland Court of Appeals that *de jure* segregation did not exist. See *Borders*, page 8, 9, *supra*.

In *Miller v. Board of Education of Jefferson County, Ky.*, 54 F.R.D. 393, (D.C. Ky. 1971) affirmed 452 F.2d 894, the plaintiff teacher was held not to have shown that the defendant board of education was motivated by political considerations and the court entered summary judgment for the defendants. The Plaintiff failed to file affidavits and failed to present real issues of fact material in nature. However in the instant case, the plaintiffs, Vaughns, *et al.*, failed to show that the defendant Board of Education of Prince George's County had been motivated by a political consideration or a segregated policy and failed to establish that the said board was solely responsible for the operation of the county wide school system.

In *Perry, et al., v. Sinderman*, 408 U.S. 593, 92 S. Ct.

)4, 33 L. Ed.2d 570, (1972), this Court held that the grant summary judgment against a college professor for a junior lege on not having his teaching contract renewed, without l exploration of the issue of allegations of a *bona fide* ıstitutional claim, was improper (at 598), and it affirmed : 5th Circuit which had reversed and remanded the case for ıl. 430 F.2d 939 (C.A. 5th Cir. 1970).

This Court held in *Board of Regents of State Colleges, et v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548)72), that a college professor was not entitled to summary lgment and that the United States District Court erred in t having the professor show that he was deprived of liberty property protected by the Fourteenth Amendment. This lding required further evidentiary proceedings in the lower ıurt. 446 F.2d 806 (C.A. 7th Cir. 1971).

Respondents, Eller, *et al.*, believe that the law is clear d that for the lower court in the instant case to have taken ch a serious matter as the mass busing of thousands of hool children in such a light concept of judicial proceedings, even permit the issue of summary judgment proceedings to considered, is error standing alone and a decision of Judge ıufman's that should not be allowed to stand. We ask for mand and full evidentiary proceedings below. In further pport also see, *Whitaker v. Coleman*, 115 F. 2d 305 (C.A. h Cir. 1940); *Cole v. Chevron Chemical Co.*, 427 F. 2d 390 .A. 5th Cir. 1970); *Pred v. Board of Public Instructions*, 5 F.2d 851 (C.A. 5th Cir. 1969); *Johnson v. Branch*, 364 2d 177 (C.A. 4th Cir., *en banc*, 1966), cert. denied 385 S. 1003, 87 S. Ct. 706, 17 L.Ed.2d 542 (1967); *Jones v.)pper*, 410 F.2d 1323 (C.A. 10th Cir., *en banc*, 1969), cert. nied 397 U.S. 991, 90 S. Ct. 1111, 25 L. Ed.2d 399 970).

espondents' rights have been violated as guaranteed under e Constitution of the United States, Amendment V.

II

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DECIDING THAT A COUNTY SCHOOL SYSTEM WAS NOT DESEGREGATED WHEREBY SUCH DETERMINATION WAS BASED SOLELY ON *BLACK-WHITE RATIOS* OF STUDENT ASSIGNMENTS CONTRARY TO THIS COURT'S HOLDINGS IN *SWANN* AND *KEYES*.

On July 25, 1972, Judge Kaufman wrote in his opinion (67a-68a):

> "At the present time, the Prince George's County School system has a total enrollment of 162,828 pupils of which 22.4% are black and 77.6% are white. Sixty-one percent of the black attended schools with student bodies greater than 50% black and 40% of the black pupils attend schools which are greater than 80% black. Forty-seven percent of the white students attend schools which are greater than 95% white and 66% attend schools which are greater than 90% white."

The lower Court could not get off this "kick" of considering only *black-white ratios* and misinterpreted the law.

THE *SWANN - KEYES* STANDARD

The lower Court from the record did not understand *Swann* and used *racial-ratios* of pupils as the only criteria for determination of a dual versus a unitary school system and totally ignored Mr. Chief Justice Burger's words,

> "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." 402 U.S. 25, 91 S.Ct. 1280.

This Court held in *Swann* that mathematical ratios were in

limited use in determining desegregation in Charlotte-Mecklenburg, but Judge Kaufman in Prince George's County used mathematical ratios not only to the maximum, but also as the *only* criteria. Judge Kaufman's partial summary judgment order and opinion, page 11, *supra*, are unconstitutional even before the decision by this Court in *Keyes v. School District No. 1, Denver, Colorado, et al.*, ___ U.S. ___ (Slip Opinion No. 71-507, June 21, 1973). The law of the case in *Swann* is,

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. (*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 24)"[12]

In *Keyes, supra*, Mr. Justice Brennan, speaking for the majority stated the correct legal standard in dealing with the determination of a school board's policy for desegregation to be:

> (a) Proof that the school authorities have pursued an intentional segregation policy in a substantial portion of the school district will support a finding by the trial court of the existence of a dual system. (Brennan at 10).
>
> (b) Proof that the school authorities pursued a deliberately segregated policy respecting certain schools of the school district does not necessarily constitute the whole county school system to be a dual school system. (Brennan at 13-14).

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[12] *Wright v. Council of the City of Emporia*, 407 U.S. 451, Mr. Chief Justice Burger's dissenting opinion, 451 U.S. at 473.

> (c) Where a policy of intentional segregation has been proved with respect to a significant portion of the school system, the burden is on the school authorities to prove that their actions as to other segregated schools in the system were not motivated by a segregated intent. (Brennan at 18-19).

It is specifically this holding in *Keyes*, to which Respondents Eller, *et al.*, have been directing their argument on due process of law in Judge Kaufman's Court. Under the *Keyes Doctrine, racial-ratios* are only one of the indices to determine a segregated school board policy. In addition it must be shown and proven by facts introduced into evidence that the school board pursued intentional segregation policy and that the said board must have been motivated by a segregation intent. No evidence of this nature was introduced before Judge Kaufman and its partial summary judgment order excluded any effort on the part of the school board or the intervenors to introduce such evidence. This evidence was to establish the facts on the record to determine *de facto* versus *de jure* segregation and to what schools such did apply, if indeed application was germane.

Mr. Justice Brennan in speaking for the Court in *Keyes* said,

> "What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school must be taken into consideration. (Brennan at 6).

In the instant case the lower court in its opinion dated December 13, 1972 cited *Swann* and even quoted Mr. Chief Justice Burger's words on racial balancing and mixing (41a), but failed to take into account the remainder of the holding in *Swann* which was that school faculty, facilities, etc., are part of the determination of whether or not a school system is a dual system, and what is required to continue desegregation. For in *Swann*, this Court held,

> "We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.
>
> "In *Green*[13] we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U.S. 18, 91 S.Ct. 1277.

This holding was available to the court below before issuing its partial summary judgment order (64a), but was ignored. Even if Judge Kaufman had held that the stipulated facts (JA 1a-337a) were sufficient to establish a *prima facie* case, this would have merely shifted the burden of proof to the school board to prove *on the record*, that such was not the case and that a segregated policy by the school board was not then in effect. This the lower Court failed to do and again is one of the due process violations for which your respondents are arguing before this Court.

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[13] *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716.

Mr. Justice Powell in his concurring and in part dissenting opinion in *Keyes* stated that *de facto* versus *de jure* distinction was undercut in the evaluation of constitutional doctrine from *Brown I* to *Green/Swann.* (Powell at 6-7).

Even though Mr. Justice Powell takes issue with the opinion written by Mr. Justice Brennan on *de facto* and *de jure* distinctions, an analysis of both of the holdings and the Justices' legal arguments render the same legal conclusions in the instant case. Such legal conclusions are that the lower court in the instant case did not make a proper determination that the Prince George's County School System was in fact segregated. Respondents Eller, *et al.*, maintain that the school system was not such as to have caused Judge Kaufman to have issued his massive busing orders. The lower Court's action was clearly unconstitutional. And *Keyes* supports this premise.

Mr. Justice Powell in his definitions has unknowingly defined the Prince George's County School System. For assuming without deciding that one should dismiss *de facto* and *de jure* considerations, *arguendo,* within Justice Powell's legal rationale, then the school board would be held to the standard–

> "that where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities* * * are sufficiently responsible to impose upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system." (Powell at 8-9).

The lower court did not permit in the instant case, the introduction of the type of evidence that Mr. Justice Powell is referencing. Lack of adequate authoritative evidentiary hearings and unrecorded in-chambers conference destroyed what should have been a proper record. The lower court knowingly did this, and this Court should review all of this on the record and briefs on the merits with associated oral arguments by all parties.

Let us follow Mr. Justice Powell's constitutional standards for an integrated school system as enunciated in *Keyes*:

"A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to:

(i) integrate faculties and administration;

(ii) scrupulously assure equality of facilities, instruction and curricula opportunities throughout the district;

(iii) utilize their authority to draw attendance zones to promote integration; and

(iv) locate new schools, close old ones, and determine the size and grade categories with this same objective in mind;

(v) where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind. (Powell at 10-11).

And as Justice Powell says, "A school which happens to be all or predominantly white or all or predominantly black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one." (Powell at 11).

Intervenors maintain that the Prince George's County School Board had met all these requirements in deference to Judge Kaufman's conclusions of July 25, 1972, and respondents wish to prove this before this Court after the granting of certiorari.

Even Judge Kaufman recognized that changing patterns of life affect pupil assignment in the schools when he stated

"* * *, this Court recognizes that the increased and continuing movement of blacks in recent years from the District of Columbia into Prince George's County has produced a growing and changing societal pattern in the latter jurisdiction." (69a; July 25, 1972 Opinion)

Yet the lower court would not accept evidence on the effect of this changing pattern to the influence of the school board's decision in handling the overall desegregation policy.

In *Keyes*, Mr. Justice Powell states,

> "The controlling case is *Swann* **** *Swann* purported to enunciate no new principles, relying heavily on *Brown I* and *II* and on *Green*. Yet it affirmed a district court order which had relied heavily on 'racial ratios' * * * * Lower federal courts have often read *Swann* as requiring far-reaching transportation decrees 'to achieve the greatest possible degree of actual desegregation'." 402 U.S. at 26. (Powell at 21-22).

Judge Kaufman interpreted *Swann* in this same fearful context as Mr. Justice Powell stated in *Keyes*. The lower court used the heavy hand and brought chaos into the Prince George's County School System by the *racial-ratios* interpretation of *Swann*. Judge Kaufman wrote in his opinion of July 25, 1972 "* * * so as to bring the Prince George's County School System into total compliance with the *Brown-Swann* standards to the fullest extent possible * * * *" (71a). And also Judge Kaufman stated in his opinion of December 13, 1972, "*Swann* is written in detailed and easily understandable language." (40a). Nonetheless, Judge Kaufman did exactly what Mr. Justice Powell was most concerned about. "To the extent that *Swann* may be brought to require large-scale or long-distance transportation of students in our metropolitan school districts, I record my profound misgivings. Nothing in our Constitution, commands or encourages any such court compelled disruption of public education." (*Keyes*, Powell at 22). If this Court will but listen to the words of Mr. Justice Powell, this misinterpretation of *Swann*, could be stopped by the instant case, instead of having federal district courts destroy public educational systems which have taken so many years to create.

This destructive court policy has set back the entire Prince George's County school system an average of three years in education of those attending pupils. Such facts are not in evidence before this Court, are well known to the citizens of the school district and should have been one of the criteria required by any court before issuing desegration plans. *But* in Judge Kaufman's Court it was not possible to place such information into evidence. The intervenors wanted to produce the facts but

the lower court would not permit this. Instead the lower court required that a plan be implemented *now* (69a).

Judge Kaufman has limited his holdings of segregated schools in Prince George's County to *Brown I, II* and *Swann* (64a). Should this not be overturned based upon the legal logic espoused by Mr. Justice Powell in *Keyes*?

III

THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER THE WANT OF NECESSARY PARTIES DEFENDANTS, AND RENDERED A DECISION THAT A COUNTY SCHOOL BOARD COULD ALONE BE RESPONSIBLE FOR OPERATING A DUAL VERSUS A UNIFIED SCHOOL SYSTEM, WHEN THE FACTS IN EVIDENCE DISPUTED THE SOLE RESPONSIBILITY THEORY.

Petitioners, Board of Education of Prince George's County, *et al.*, argued this reason in their brief for appellants, Board of Education, in their appeal to the United States Court of Appeals for the Fourth Circuit, Case No. 73-1023 filed January 17, 1973 (Appellant Brief No. 73-1023, pages 37 and 38). However, this *major issue of want of necessary parties defendants* has not been included in their petition to this Court filed June 22, 1973 and docketed as No. 72-1737. Respondents Ellers, *et al.*, believe that this failure on the part of petitioners is prejudicial to the total case and therefore request this Court to consider the want of necessary parties defendants as properly preserved for a United States Supreme Court judicial review.

The Maryland Annotated Code calls forth the law for the administrative control of the state school systems:

Art. 77, Sec. 19, School Budget.

Sec. 26, Approval of Sites, Buildings and Construction Plans.

Sec. 42, Establishment of Public Schools, Determination of Geographical Attendance Areas.

Sec. 47, Construction, etc. of School Buildings, Acquisition, Sales, etc.,

Sec. 60, Recommendations *** For Flashing Caution Signs,

Sec. 70, Annual Budget.

Under this law the school board does not have any authority whatsoever in decision-making which could in any way influence the issue of dual versus unitary school systems. Respondents Eller, *et al.*, argued this in their Brief for Intervenors-Appellees, on appeal to the United States Court of Appeals for the Fourth Circuit, Case No. 73-1024 filed January 15, 1973, pages 66-70. In the Joint Stipulation of Facts (JA 1a-337a) were listed the public offices and officials that were proper parties defendants in the instant case (JA 134a-137a). For example, in determining the overall issue of state authority for operating a dual school system versus a unified school system, the following ten (10) governmental offices, should not only have been subjected to full pretrial discovery proceedings but also made parties thereto.

1. Maryland-National Capital Park & Planning Commission
2. Washington Suburban Sanitary Commission
3. Prince George's County Department of Public Works
4. Maryland State Board of Education
5. Maryland State Soil Conservation Service
6. Maryland State Highway Administration
7. Maryland State Planning Department
8. State of Maryland School Inter-Departmental Construction Agency
9. County Council of Prince George's County
10. County Executive of Prince George's County

The fact that the lower court in the instant case failed to accept the role and decision-making power of these ten (10) offices over and above the Prince George's County Board of Education was error in and by itself and in direct violation of the holdings in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), in which Mr. Chief Justice Burger stated,

> "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. *** * We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. *This case does not present that question and we therefore do not decide it.* (emphasis ours). 402 U.S. 22, 23, 91 S.Ct. 1279.

None of the ten offices listed above were made party defendants in the case. None of the ten offices were brought into court for evidentiary hearings to determine whether or not the school board was acting independently in a racially segregated policy. These arguments are for the briefs on the merits. The point that Respondents, Eller, are making is that *Swann* distinguished the instant case from its holding. Therefore in accordance with this Court's holding in *Keyes, supra*, pages 19-24, *Swann* and *Keyes* dramatically show the miscarriage of justice in the lower court's rendering its erroneous decision that the Prince George's County School Board was guilty of operating a dual school system on July 25, 1972, for which the respondent-intervenors maintain was not the true status of the school system. (64a).

IV

WHERE INTERVENORS BELIEVE THAT THE COUNTY SCHOOL BOARD OF EDUCATION HAS NOT REPRESENTED THE BEST INTERESTS OF THE MAJORITY OF STUDENTS, THE AGGRIEVED CLASS, AS ANGLO-AMERICANS, HAS STANDING TO ACTIVELY PARTICIPATE IN ANY COURT SUIT AT ANY STAGE OF THE PROCEEDINGS UNDER CONSTITUTIONAL DUE PROCESS OF LAW.

Respondent-intervenors anticipated that when the Board of Education requested and received an extension of time in which to prepare their petition in the instant case, they would perform in a thorough manner. However, as intervenors, an objection is raised to their petition in that it is the identical brief filed in the United States Court of Appeals for the Fourth Circuit, said brief being on the merits of the case and not reasons for granting the writ of certiorari. Careful scrutiny of their petition (PWC 1-25) will disclose that the new material added is as follows:

PWC 4	-	First paragraph of Statement of the Case
PWC 6, 7	-	Beginning with the next to the last paragraph on page 6 and all of page 7.
PWC 8, 9	-	Last paragraph on page 8 and top of page 9.
PWC 21	-	First sentence of first paragraph on page 21.
PWC 24	-	Topic of Remaining Issues on page 24.

In addition, the petitioners dutifully changed the word of "appellant" to "petitioner" throughout their document as appropriate. It is for these slight changes above that the Petitioners, Board of Education of Prince George's County, *et al.*, asked this Court to grant an extension of time for filing, thereby causing the decision on granting or denying certiorari to be delayed until the next term. (PWC 62a).

The Petitioners, Board of Education, made the respondents-intervenors believe that they were going to take issue with

the initial busing plan, but petitioners have left absent any argument or federal question on the topic. For example, during the December 4, 1972 hearing, the Honorable Judge Kaufman stated,

> "Actually as you gentlemen all know, this hearing today was scheduled to try to take care of certain preliminaries, it was never contemplated that we were going into details of the plans today within a few minutes after submission. As a matter of fact, all counsel asked for time to confer, and you wanted, if you'll remember, about ten days, and we worked out a hearing schedule pursuant to which hearings on the details of the plans themselves would start on December 13, * * *" (Transcript 12-4-72, page 8).

And then on December 13, 1972, Judge Kaufman stated,

> "I want to do that (taking testimony) especially in view of the fact that there has been every indication given to me by Mr. Nussbaum (attorney for the school board) and Mr. Nanna (attorney for intervenors) that one or both of the Defendants and/or the Intervenors would be taking an appeal from almost any Order of this Court." (Transcript 12-13-72, page 4).

The U.S. District Court for the District of Maryland in its order of December 28, 1972 (page 11a) approved a desegregation plan based solely on the number of Blacks being transferred and the number of Whites being transferred, in order to achieve percentages of Blacks and Whites in each school. As directed by the District Court, this method of attaining a unitary school system was based solely on race and for no other reason. Such method was not within the *Constitutional Commands* of *Brown II*. To accomplish the *court-ordered-racial-ratios*, it has been necessary for the school system to use massive busing.

Judge Kaufman ordered on December 29, 1972, to be effective on January 29, 1973, *inter alia*, as follows:

> "The school board is today being ordered, in a separate document to implement the * * * staff plan. **** That Order, in this Court's opinion, is a final

> Order *as to the issue of student attendance.* Other issues pertaining to faculty, administration, school construction, and legal fees and reimbursable costs * * * are reserved for subsequent determination by this Court." (page 32a) (emphasis added)

Even though *bus transportation* is one *tool of desegregation* which school authorities may be required to use (*Swann*, 402 U.S. at 30), busing for the purpose of achieving racial balance on the sole issue of student attendance is not within the *Constitutional Commands.*

The District Court in the instant case has exceeded all *Constitutional Commands* by ordering, establishing, and approving the *Staff Plan* as follows:

> "The Staff Plan calls for a relatively small number of schools to remain more than 90% White but for none, except for the only two schools in the County which are to be 'paired,' to be more than 50% Black" (page 12a-16a).

The District Court Order skirts the category issue of racial balance in Charts I, II and III referred to above (page 18a-19a) by the following statistical references:

Chart I	– Eligible For Busing	– Staff Plan 56.1%
Chart II	– Eligible For Busing	– Staff Plan 90,761 students
Chart III	– To Be Transferred	– Staff Plan 32,823 students

Within the *Staff Plan* is stated that "This plan affects 188 schools and reassigns 32,823 (16,140 Black – 16,683 White) * * *, of which 12,290 (8,273 Black – 4,017 White) presently walk to school". The *Staff Plan* continues to provide statistics but carefully lists *so many Blacks* and then *so many Whites.* This entire plan is based solely on achieving desegregation by *ratio* of Blacks to White and is unconstitutional, *ipso facto.* Intervenors ask this Court to permit them to argue on the brief on the merits, the issue of this school plan, which is unconstitutional, even though the petitioners have not so reserved.

Anglo-Americans have a right to intervene in school desegregation cases if such intervention is timely and notice has been properly given to said class.[14] Respondents in their Motion to Intervene cited F.R.C.P. Rule 24(a)(2) as authority (p. 77a). This Court needs to follow its previous holding in *Trbovich*.

Certiorari was granted by this Court to determine whether the LMRDA imposed a bar to intervention by union members under F.R.C.P. Rule 24 in a suit initiated by the Secretary of Labor, *Trbovich v. U.M.W.A. et al.* 404 U.S. ____, 92 S.Ct. 202, 30 L.Ed2d 160 (1971).

In *Trbovich v. U.M.W.A. et al.* ____US____, 92 S.Ct. 630, ____ L.Ed.2d ____, (1972) this Court held under the LMRDA and Rule 24, that the Secretary of Labor by statute had the duty to serve two distinct interests, which are related, but not identical. First, the statute gives the individual union members certain rights against their union, and "The Secretary of Labor in effect becomes the union member's lawyer" for purposes of enforcing those rights. **** And second, the Secretary has an obligation to protect the "vital public interest in assuring free and democratic union elections that transcend the narrow interest of the complaining union member" **** Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of "his lawyer".

By analogy, the Prince George's County Board of Education is a governmental unit, just as the Secretary of Labor is. Where the school board's attorney fails to do those things in representing all Anglo-American students and their parents as a class, the Anglo-American representative group has a right to enforce a valid complaint regarding the performance of "his lawyer," just

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[14]See *Intervention: Moore v. Levi*, Federal Intervention, 45 Yale L.J. 565, 47 Yale L.J. 898 (1936); *Multiparty Litigation in Federal Courts*, 71 Harv.L.Rev. 874, 897-906, 988-992; (1958), *Intervention Before Courts*, 81 Harv.L.Rev. 721, 726-726 (1968).

as *Trbovich* complained about the Secretary of Labor. The fact that there is a similar school desegregation statute (86 Stat. 235), providing rights to aggrieved Anglo-Americans such as is granted to union members under the LMRDA, should be significant in analyzing respondents' constitutional rights of adequate representation.[15] Respondents request this Court to grant the same privilege of certiorari as was done for *Trbovich*. Briefs on the merits and oral argument can determine those requirements necessary for intervenors to qualify under the federal rules and law in all school desegregation cases from this time forward.

Eller, *et al.*, believe that the United States District Court of Maryland discriminated against Prince George's County Anglo-Americans by denying them the right to put on evidence. The school board's attorney did *not* represent said class and in many ways has jeopardized their constitutional rights, by continually requesting delays at all Court levels.

The United States Constitution, Amendment V, guarantees to the Respondents, Eller, *et al.*, that under due process of law, they have the property right and the liberty to be part of the instant case. To advocate that procedural due process of law must be constitutionally imposed upon the United States District Court for the District of Maryland protects their substantive due process of law rights. Such are for the trial on the merits following full evidentiary pre-trial and then trial proceedings under the Federal Rules of Civil Procedure.

Respondent-Intervenors, Eller, *et al.*, therefore request this Court in considering the instant case as well as their petition, Case No. 72-1428, that they be granted the status of being

---

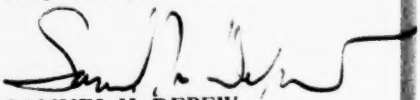
[15]Public Law 92-318, Title VIII, Sec. 804 passed June 23, 1972 reads: "A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, may seek to reopen or interfere in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process." Also see §§803, 805, 806 of Title Vii; the District Court Order of December 29, 1972 (page 11a) has timely placed those Anglo-American pupils, represented by your respondent, squarely within this Act of Congress.

petitioners in preparing the brief on the merits, not only as to their rights as Anglo-Americans as a class to represent themselves at all stages of all court proceedings, but also to represent and argue, in addition to the attorney for the school board, the merits for all other federal questions presented that this Court shall approve or prepare and that said intervenors shall not have the status of respondents in the instant case, No. 72-1737. In support of this proffer to the Court, the intervenors have included the preceding argument of which part has been filed in their case No. 72-1428.

CONCLUSION

For the reasons set out in this Brief in Support of the Petition for Writ of Certiorari filed in the instant case, your Respondents-Intervenors, Eller, *et al.*, this Court should grant the writ of certiorari and set the case down for briefing and argument on the merits for the October 1973 Term.

Respectfully submitted,



July 19, 1973

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FILED
JUL 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1972

No. 72–1737

Board of Education of Prince George's County, *et al.*,
Petitioners

v.

Sylvester J. Vaughns, Jr., *et al.*,
Respondent

v.

Jesse Alexander Eller, *et al.*, *Intervenors*
Respondent

RESPONDENTS' ELLER, ET AL. BRIEF IN SUPPORT OF PETITIONERS', BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX FOR RESPONDENTS JESSE ALEXANDER ELLER, ET AL.

BEACON PRINTING - 293-7160 - Washington, D.C. 20036

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1. Exhibit "A" - Judgment and Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, 1024 dated January 23, 1973, Affirms Lower Court Decision 1a

2. Exhibit "B" - Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, Granting and Denying Amicus Curiae Standing, dated January 19, 1973 . . . . . 7a

3. Exhibit "C" - Order of United States Court of Appeals for the Fourth Circuit Case No. 73-1023, 1024 Postponing Stay, Dated January 10, 1973 . . . . . 9a

4. Exhibit "D" - Order of United States District Court for the District of Maryland, Civil No. 72-325-K dated December 29, 1972, Implementing Students Transfers and Busing Plan 11a

5. Exhibit "E" - Court Memorandum of United States District Court for the District of Maryland, Civil No. 72-375-K dated December 13, 1972, Implementing Order 33a

6. Exhibit "F" - Order of United States Court of Appeals for the Fourth Circuit, Case No. 72-2129, 2130, 2131 dated October 12, 1972 Interlocutory Appeal 46a

7. Exhibit "G" - Order of United States District Court for the District of Maryland, Civil No. 72-325-K dated August 31, 1972, Implementing Order 52a

8. Exhibit "H" - Order of United States District Court for the District of Maryland, Civil No. 72-325-K, dated July 25, 1972, granting Plaintiff's Motion for Summary Judgment 64a

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9. Exhibit "I" - Court Opinion and Order of United States District Court for District of Maryland, Civil No. 72-325-K dated July 25, 1972 holding *sub curia* all issues 65a

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EXHIBIT "A"
JUDGMENT

United States Court of Appeals

For the
Fourth Circuit

No. 73-1023

Sylvester J. Vaughns, Jr., etc., et als,

Appellees,

versus

Board of Education of Prince George's County; et als,

Appellants.

Appeal from the United States District Court for the —— District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland.

, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed. It is further ordered that the mandate shall issue forthwith, and the Court reserves the right to file a written opinion at a later date.

CLERK

FILED
JAN 23 1973
WILLIAM K. SLATE, II
CLERK

JUDGMENT

IN THE

United States Court of Appeals

For the
Fourth Circuit

No. 73-1024

Jesse Alexander Eller, et als,

Appellants,

versus

Board of Education of Prince George's County; et als,

Appellees

Appeal from the United States District Court for the — District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland.

, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed. It is further ordered that the mandate shall issue forthwith, and the Court reserves the right to file a written opinion at a later date.

CLERK

FILED
JAN 23 1973
WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1023

Sylvester J. Vaughns, Jr., by his father and next friend, Sylvester J. Vaughns; Toika E. Wheatfall, by her father and next friend, Walter E. Wheatfall; James R. L. Brooks, Jr., by his father and next friend, James R. L. Brooks; Reginald Wiggs, by his father and next friend, Hosea D. Wiggs; Reginald A. Jackson, Jr., by his father and next friend, Reginald A. Jackson; Denise A. Ligon, by her father and next friend Dennis J. Ligon, Jr.; Carolyn Gilmore, by her father and next friend, Sterling K. Gilmore; John A. Williams, by his father and next friend, John J. Williams, individually and on behalf of all other persons similarly situated, and Jesse Alexander Eller; Martha Street Eller; Brendan Edward Lynch; Marjorie Elain Lynch; Kenneth Phillip Whittemore; Bette Ann Whittmore; Arthur Emanual Dinerman; Janet Avin Dinerman; Morris Edward Sampson; Thelma Olinda Sampson; Willima Raymond Leer; Margaret Street Leer; Leo Paul Chabot; Wanda Maxine Chabot; John Eugene Spaulding; Bernadine Lane Spaulding,

Appellees,

versus

Board of Education of Prince George's County; A. James Golato, President of the Board of Education of Prince George's County and Chester E. Whiting, Joanne T. Goldsmith, Dr. Rodney W. Johnson, Sue V. Mills, Dr. J. Righton Robertson, Jesse J. Warr, Jr., Phyllis E. Williams, Ruth S. Wolf, Members of The Board of Education of Prince George's County; and Dr. Carl W. Hassell, Superintendent of Schools of Prince George's County,

Appellants.

United States of America,

Amicus Curiae,

State of Maryland, Governor of Maryland, and State Superintendent of School of Maryland,

Amicus Curiae,

Prince George's County,

Amicus Curiae,

City of Bowie,

Amicus Curiae,

City of New Carrollton,

Amicus Curiae.

No. 73-1024

Jesse Alexander Eller; Martha Street Eller; Brendan Edward Lunch; Marjorie Elaine Lynch; Kenneth Phillip Whittemore; Bette Ann Whittmore; Arthur Emanuel Dinerman; Janet Avin Dinerman; Morris Edward Sampson; Thelma Olinda Sampson; Willima Raymond Leer; Margaret Street Leer; Leo Paul Chabot; Wanda Maxine Chabot; John Eugene Spaulding; Bernadine Lane Spaulding,

Appellants,

versus

Board of Education of Prince George's County; A. James Golato, President of the Board of Education of Prince George's County and Chester E. Whiting, Joanne T. Goldsmith, Dr. Rodney W. Johnson, Sue V. Mills, Dr. J. Righton Robertson, Jesse J. Warr, Jr.,

Phyllis E. Williams, Ruth S. Wolf, Members of the Board of Education of Prince George's County; and Dr. Carl W. Hassell, Superintendent of Schools of Prince George's County,

Appellees.

United States of America,

Amicus Curiae,

State of Maryland, Governor of Maryland, and State Superintendent of Schools of Maryland,

Amicus Curiae,

Prince George's County,

Amicus Curiae,

City of Bowie,

Amicus Curiae,

City of New Carrollton,

Amicus Curiae.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

On instruction from the court after its consideration of the record and briefs, and after hearing the argument at bar of counsel, judgment is hereby entered, under Rule 36 of the Federal Rules of Appellate Procedure, affirming the order on appeal in this case.

IT IS FURTHER ORDERED THAT the mandate shall issue forthwith, and the Court reserves the right to file a written opinion at a later date.

CLERK

FILED

JAN 23 1973

WILLIAM K. SLATE, II
CLERK

EXHIBIT "B"
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1023

Sylvester J. Vaughns, Jr., etc., et al.,

Appellees,

v.

Board of Education of Prince George's County, et al.,

Appellants.

United States of America,

Amicus Curiae.

State of Maryland, et al.,

Amicus Curiae.

Prince George's County,

Amicus Curiae.

City of Bowie,

Amicus Curiae.

City of New Carrollton,

Amicus Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Upon consideration of various motions for leave to file briefs as amicus curiae,

IT IS ORDERED that:

(1) the motion of the petitioners, State of Maryland, Governor of Maryland, and State Superintendent, for leave to file brief amicus curiae and to present oral statement at the hearing on Monday, January 22, 1973, is *granted*;

(2) the motion of Prince George's County for leave to file brief amicus curiae is *granted*;

(3) the motion of the City of Bowie for leave to file brief amicus curiae is *granted*;

(4) the motion of the City of New Carrollton for leave to file brief amicus curiae is *granted*;

(5) the motion of Sturgis J. White to intercede as friend of the Court is *denied*.

For the Court - by direction.

CLERK

FILED
JAN 19 1973
WILLIAM K. SLATE, II
CLERK

EXHIBIT "C"
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Sylvester J. Vaughns, Jr., by his father and next friend, Sylvester J. Vaughns; Toika E. Wheatfall, by her father and next friend, Walter E. Wheatfall; James R. L. Brooks, Jr., by his father and next friend, James R. L. Brooks; Reginald Wiggs, by his father and next friend, Hosea D. Wiggs; Reginald A. Jackson, Jr., by his father and next friend, Reginald A. Jackson; Denise A. Ligon, by her father and next friend, Dennis J. Ligon, Jr.; Carolyn Gilmore, by her father and next friend, Sterling K. Gilmore; John A. Williams, by his father and next friend, John J. Williams, individually and on behalf of all other persons similarly situated, and Jesse Alexander Eller; Martha Street Eller; Brendan Edward Lynch; Marjorie Elain Lynch; Kenneth Phillip Whittemore; Bette Ann Whittmore; Arthur Emanual Dinerman; Janet Avin Dinerman; MOrris Edward Sampson; Thelma Olinda Sampson; Willima Raymond Leer; Margaret Street Leer; Leo Paul Chabot; Wanda Maxine Chabot; John Eugene Spaulding; Bernadine Lane Spaulding,

FILED
JAN 10 1973
WILLIAM K. SLATE, II
CLERK

Appellees,

versus

Board of Education of Prince George's County; A. James Golato, President of The Board of Education of Prince George's County and Chester E. Whiting, Joanne T. Goldsmith, Dr. Rodney W. Johnson, Sue V. Mills, Dr. J. Righton Robertson, Jesse J. Warr, Jr., Phyllis E. Williams, Ruth S. Wolf, Members of The Board of Education of Prince George's County; and Dr. Carl W. Hassell, Superintendent of Schools of Prince George's County,

Appellants.

Appeal from the United States Distrct Court for the District of Maryland, at Baltimore.

Applications to stay the order of the District Court pending appeal have been received.

The Chief Judge of this Court was in indirect communication with counsel late last month, informing them that if a notice were promptly filed and an expedited brief schedule followed, any appeal or appeals would be heard by the Court during this week. The School Board did not promptly file a notice of appeal and counsel for the School Board reported that due, in part at least, to a temporary illness on his part, he could not file a brief in the Court in time for the case to be heard this week. Instead, he filed an application for a stay.

A brief on behalf of the plaintiffs has now been filed with the Court. We recognize the desirability of having the issues on appeal determined, if possible, before the date set in the order of the District Court for its effectuation. This was the reason for the Court's willingness to provide quick expedition for the appeal. The Court is still prepared to expedite it. To that end, the case will be heard by the Court sitting *en banc* at the United States Courthouse in Alexandria, Virginia, on Monday, January 22, 1973, at 11:00 o'clock in the morning. A brief on behalf of the School Board may be filed with the Clerk on or before Wednesday, January 17, 1973.

Further action on the applications for a stay will be postponed until the hearing of the appeal on the merits.

With the concurrence of Judges Winter, Craven, Butzner, Russell and Widener.

_____

Chief Judge, Fourth Judicial Circuit

EXHIBIT "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-325-K

SYLVESTER J. VAUGHNS, JR., ET AL.

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL

Filed: December 29, 1972

Richard V. Falcon, Kenneth L. Johnson and Gerald A. Smith, of Baltimore, Maryland, for Plaintiffs.

Paul M. Nussbaum, of Mt. Rainier, Maryland, for Defendants.

Emmett H. Nanna, Jr., of Hyattsville, Maryland, for Intervenors.

Kaufman, District Judge.

This opinion is the culmination of proceedings instituted in this Court on March 29, 1972 seeking the establishment of a constitutional system of public school education in Prince George's County, Maryland. In earlier opinions this Court has held that that system is presently in violation of the federal constitutional standards set forth by the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (*Swann*). Defendants have at all times since the commencement of this case contended that the Prince George's school system complies with constitutional requirements and, in the alternative, that the system attained such compliance in the mid-1960's and that no "action by the school authorities"[1] has caused it to fall out of com-

[1] *Swann* at 23.

pliance since the mid-1960's. Accordingly, the defendants contend that there is presented in this case the question of

> whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. * * *[2]

In *Swann* (at 22-23), the Chief Justice stated that it was not necessary for the Court to reach that question. Neither is it necessary in this case for this Court to reach that question, since the facts to which the parties stipulated—all of which facts are undisputedly set forth in the records of the School Board itself—reveal that the pre-*Brown I* segregated system was never effectively dismantled, either before or after 1956 when the School Board adopted a "freedom of choice" plan.[3]

On May 27, 1968, in *Green* v. *County School Board*, 391 U.S. 430, 439 (1968), the Supreme Court held that a freedom of choice concept would be a valid remedial measure only if it was effective and only if it "promises realistically to work *now*". The present Prince George's County school population is approximately 160,000, of which about 22.4% is black. Since May 27, 1968, the School Board has opened 35 new schools—5 senior high, 10 junior high and 20 elementary. Of that 35, 24, or over 2/3 of the 35, opened with—and 23 of those 24 still maintain today—student populations more than 50% black or less than 10% black;[4]

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2 *Swann* at 23.

3 *See* the discussion in this Court's opinion filed July 25, 1972, pp. 2-4.

4 *See* Prince George's County Public Schools, Report of Schools, 1953-54 School Year to 1971-72 School Year, filed as an exhibit in this case, which also reveals that of the 232 schools in Prince George's County today, 153 of them have opened since September, 1954, and of that 153, 135 opened with over 90% white or more than 50% black; and that of that 135, 9 were senior high, 27 junior high and 99 elementary. Schools opened after September, 1954 but closed before September, 1971 have not been included in the totals. Schools designated as "Jr.-Sr." in the aforesaid Report have been treated as junior high schools in compiling these figures and the figures in n.5 *infra*.

and 5 of them opened with more than 90% black student population and 13 of them with more than 90% white population.[5] That record has been complied not only in the face of *Green* but after the United States Court of Appeals for the Fourth Circuit emphasized in *Brewer* v. *School Board of the City of Norfolk, Virginia*, 397 F.2d 37, 42 (4th Cir. 1968),[6] that a "school construction program is an appropriate matter for court consideration . . . ." In *Swann* (at 20, 21), writing in 1971, Mr. Chief Justice Burger stressed, *inter alia*, the importance of new school construction in order to achieve and maintain a desegregated school system.

That factual and legal background and the facts reviewed in earlier opinions of this Court, compel the conclusion that regardless of the reason why, the Prince George's County School Board has disregarded the mandates of the highest Court of our land. It was for that reason that this Court ordered on August 31, 1972, and again on November 14, 1972 after the Fourth Circuit filed its opinion in this case on October 12, 1972, the presentation by defendants, on or before December 4, 1972, of plans embodying changeovers to a constitutional school system to become effective in whole or in part on January 29, 1973. While the School Board presented four alternative plans on December 4, 1972, one of them (denominated as Plan IV) is based upon the same freedom of choice principles which had failed in Prince George's County to produce a constitutional system in the past. Thus, under *Green*, that plan cannot pass

[5] *See* that same Prince George's County Public Schools, Report of Schools, 1953-1954 School Year to 1971-72 School Year, filed as an exhibit in this case, which further reveals that of the 153 schools opened in Prince George's County since September, 1954 (*see* n.4 *supra*), 127 opened with student populations either 90% or more black or 90% or more white, and that of that 127, there were 7 senior high schools, 27 junior high schools and 95 elementary schools.

[6] The *Brewer* opinion, filed May 31, 1968, four days after *Green*, cited *Green* (*Brewer* at 39).

constitutional muster. Plan I, the only one of the four plans submitted on December 4, 1972 which was supported with any detailed facts and analyses,[7] was based upon a rather rigid application[8] of a self-imposed mathematical standard calling for the reduction of the black student populations of all schools being more than 50% black to 35% or less black[9] and leaving untouched 82 schools having white populations of more than 90%.[10]

On December 7, 1972, a further revised but still unconstitutional plan[11] was submitted, calling for 32 schools with a white student population of more than 90%. With time slipping rapidly toward January 29, 1973 and with no constitutional plan in sight, this Court, on December 7, 1972, with the consent of the parties and their counsel, instituted a series of lengthy chambers conferences with counsel and with staff experts of the Prince George's County School system. During those conferences, those

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7 And even Plan I was only so supported with relation to senior and junior high schools. Plan I, as submitted on December 4, 1972, contained no details or breakdowns re the elementary schools. Those details were supplied at a later date to this Court. And Plan I was also changed in other respects than indicated within its own documentary presentation to this Court. *See* the two-starred comment to Chart III on page 9A, *infra*.

8 The Chief Justice's warning in *Swann* and in his dissent in Wright v. Council of City of Emporia, 407 U.S. 451 (1972), and Mr. Justice Stewart's similar warning in his majority opinion in *Wright*, against the use of any rigid mathematical formula is discussed in this Court's Memorandum filed December 13, 1972, pp. 10-11.

9 Plan II utilizes a 40% guideline in place of the 35% guideline in Plan I. However, *no* details whatsoever were submitted in connection with Plan II (or Plans III or IV for that matter). Plan III involves changing the racial composition of only eight schools—one senior high, one junior high and six elementary—all of which opened 100% black, to 35% black.

10 Of that 82, 2 were senior high, 2 junior high and 78 elementary. Plan I also included a large scale transfer at one school for the sole purpose of achieving a 2% change from 28% black to 26% black. That change has been eliminated from the School Board's staff plan submitted to this Court on December 26, 1972 and discussed *infra*.

11 This plan was a further development of Plan II presented on December 4, 1972 and still contained a rigid 40% guideline.

staff officials demonstrated familiarity with the commands of the Supreme Court in *Swann* and also demonstrated the willingness and the ability under time pressure to produce a constitutional plan.[12] That plan has been accepted as "educationally sound" by defendants if its implementation is delayed *in toto* until September, 1973 and by plaintiffs as constitutionally sufficient.[13] Plaintiffs seek implementation of the plan on January 29, 1973, except with regard to the twelfth grade, and otherwise ask only that this Court, in the exercise of its continuing jurisdiction,[14] be ready to require further changes if school attendance shifts operate in the near future to resegregate any school.

The staff plan calls for a relatively small number of schools[14A] to remain more than 90% white but for none,

[12] This Court has been informed that that staff plan was presented on December 22, 1972 to the School Board and was rejected by a 5 to 4 vote, and that one of the reasons stated by one or more of the Board members for rejection was that the Board had insufficient time to consider the plan. Any approach based upon "insufficiency of time for consideration" of the staff plan submitted to the School Board on December 22, 1972 and to this Court on December 26, 1972 is rejected by this Court. On August 31, 1972 and continuously thereafter to and including December 4, 1972, the School Board was required by Orders of this Court to prepare plans meeting *Brown-Swann* standards—and failed to do so. The differences between Plan I submitted December 4, 1972 and the staff plan are easily explainable to any one who was familiar with the details of Plan I, particularly, if as this Court assumes, each School Board member became familiar with, if not before August 31, 1971, certainly shortly thereafter, the racial compositions of the student populations of each school, the capacity of each school for student attendance, the location of each school and the roads leading to it, and the interrelationship of those facts—as well as with the plain and clearly spoken words of the Chief Justice in *Swann*.

[13] Intervenors contend that the existing school system is constitutional and take no position as to the staff plan.

[14] *See* page 21, *infra*, referring to Raney v. Board of Education, 391 U.S. 443, 449 (1968).

[14A] Eleven schools, 2 senior high, 4 junior high, and 5 elementary, will be less than 10% black, but nine of that eleven will be 8.2% or more black. One of the two remaining schools is a junior high school which will remain at its present level of 5.6% black and the other remaining school is an elementary school which will change from 2.4% to 7.5% black.

except for the only two schools in the County which are to be "paired", to be more than 50% black. Most of those which are more than 90% white are expected to become a lesser percentage white as new school construction and expected demographic changes occur.[15] The staff plan was

[15] In Green v. County School Board, *supra* at 442, the Supreme Court stated that a plan meeting constitutional standards converts a school system to one without white schools or black schools but just schools. *See also* Raney v. Board of Education, 391 U.S. 443, 448 (1968). In Monroe v. Bd. of Comm'rs, 391 U.S. 450, 456-458 (1968), the Court reaffirmed the principles set down in *Green* and held that a "free-transfer" plan resulting in one junior high being all black, one junior high with 812 white and 12 black students and one junior high with 349 white and 135 black students (the ratio of black-white students throughout the school system was 40-60) did not satisfy the *Green* test of converting to "just schools".

In *Swann* (71% white pupils, 29% black in a school system of 84,000 students), the Supreme Court affirmed a desegregation plan in which 9 of the 10 high schools had 17%-36% black students with one high school having 2% blacks; 20 of 21 junior highs having 0%-38% blacks with one junior high having 90% blacks; and 76 elementary schools having 9% to 38% blacks. The Court in *Swann* (at 15) stated that in formulating a desegregation order, "flexibility" and "mercy" reconciling the needs between the public interest and private needs as well as between competing private claims should be used. In *Swann*, the District Court set as a goal a ratio of 71%-29% (white-black pupils) in each *school* and aimed at a 71-29 ratio in each grade. The actual plan varied widely from the goal (as low as 0% blacks to as high as 38% blacks with one school 90% black). The Supreme Court approved the use of 71-29 ratio as a starting point but stressed that it was not to be used as an inflexible requirement (*see* n.8 *supra*).

In McDaniel v. Barresi, 402 U.S. 39 (1971), the Court approved a plan for elementary schools with a ratio of 65% white-33% black students throughout the system and in which the black student population at each school varied from 20%-40% with two schools at 50%.

In Davis v. Bd. of Comm'rs of Mobile County, 430 F.2d 883 (5th Cir. 1970), the Fifth Circuit approved a desegregation plan in a school system with a ratio of 58%-42% white to black students in which senior highs (10) had from 8% to 69% black, junior highs from 8% black to 85% black, and elementary schools from 0%-100% black with percentages ranging from 7% black to over 90% black (total students in the system was 73,000). Those figures are estimates (based on data set forth at 430 F.2d *supra* at 889). They exclude schools in Mobile, Alabama lying west of I-65 which the Fifth Circuit treated separately but which the Supreme Court subsequently ruled had to be treated as not lying in a separate section but as part of one overall Mobile system. 402 U.S. 33 (1971). However, the Supreme Court at no point indicated any disapproval of the ratios of blacks in the schools lying east of I-65.

prepared with full attention focused upon "the desirability of achieving constitutional standards with regard to desegregation and at the same time limiting the number of students who, by the impact of such standards, will

(1) be transferred to a school other than the one they would otherwise be attending;

(2) become school bus riders rather than walkers; or

(3) be caused to ride additional miles on school busses." [16]

In that regard, the following charts are revealing:

[16] Memorandum of this Court in this case, filed December 13, 1972, p. 6.

CHART I

Percentage of Students	Entire School System	Senior High 10th, 11th & 12th	Senior High 10th & 11th	Junior High	Elementary Including Kindergarten
Presently eligible for busing	48.4%	73.3%	73.3%	57.8%	36.2%
Eligible for busing under Plan I submitted 12/4/72	56.4%	74.7%	74.7%	63.8%	47.2%
Eligible for busing under staff Plan submitted 12/26/72	56.1%	74.5%	74.5%	62.4%	47.3%

CHART II

Number of Students	Entire School System *	Senior High 10th, 11th & 12th	Senior High 10th & 11th	Junior High	Elementary Including Kindergarten
Presently eligible for busing	78,364	22,595	13,953	22,370	33,399
Eligible for busing under Plan I submitted 12/4/72	91,304	23,047	14,269	24,722	43,535
Eligible for busing under staff Plan submitted 12/26/72	90,761	22,952	14,203	24,162	43,647

* Total includes all children eligible to be transported. This data obtained from the Annual Transportation Report, September, 1972, compiled by the Pupil Accounting Office. The words "Entire School System" as used in all three charts include kindergarten through 12th grade. *See*, e.g., n.17A, *infra*, and *compare* the total of 12,290 students made eligible for busing in all grades except the 12th grade as opposed to 12,397 (90,761 — 78,364).

CHART III

Number of Students	Entire School System	Senior High 10th, 11th & 12th	Senior High 10th & 11th	Junior High	Elementary Including Kindergarten
To Be Transferred under Plan I submitted 12/4/72	34,103*	7,205	5,182	12,023	16,898**
To Be Transferred under staff Plan submitted 12/26/72	32,823***	5,561	4,037	8,051	20,735

* Does not include 1,504 seniors who remain at their present schools because of delay in 12th grade implementation until September, 1973.

** Page 30 of Plan I states that 70% of the 31,447 elementary school students would be "involved in some form of change". That plan apparently included many pairings and clusterings. The figures used in this chart are revised to exclude almost all of those pairings and clusterings. However, neither Plan I nor any presentation of it by counsel for defendants ever explained that elimination. Thus, until after December 26, 1972, this Court was advised that Plan I would affect over 64,000 elementary school students as well as certain additional junior high and senior high students.

*** Does not include 2,023 seniors who remain at their present schools because of delay in 12th grade implementation until September, 1973.

The use of the words "eligible for busing" is to be noted. There are apparently no figures which reflect the number of students eligible for busing who utilize private transportation—and thus no figures showing the number actually presently bused. However, the staff plan will make eligible for busing less than 8% more of the total population than are now so eligible.

This Court cannot sufficiently commend the efforts and the accomplishments of the School Board staff members who, as professionals, have completed the staff plan submitted on December 26, 1972. While that plan will require changes in the school attendance of a large number of students, it also provides a maximum busing time per trip for any student from the moment the student ascends a school bus until the bus arrives at school (and the same for the return trip) of 35 minutes, with a mean average of about 14 minutes per one-way bus trip from home to school, or school to home.[17]

A careful review of the staff plan, or even a quick review of the chart included at p. 9 *supra*, discloses that while the staff plan will cause changes in student attendance and in bus eligibility at the senior and junior high levels, it will cause many more such changes to occur in the elementary schools.[17A] The staff members who participated in the chambers conferences have indicated that in their opinion

[17] *Compare* with the apparent maximum trip embodied in the Charlotte-Mecklenburg plan approved in *Swann* (at 30) though in that case the 35 minutes apparently represented a reduction in the maximum one-way bus trip time which existed prior to Judge McMillan's *Swann* decree. *See also* the approved "30 minutes each way" plan in Brewer v. School Board of City of Norfolk, Virginia, 456 F.2d 963, 945 (4th Cir.), *cert. denied*, 406 U.S. 905 (1972); *and see* Northcross v. Board of Education of Memphis, ___ F.2d ___ (August 29, 1972) (slip opinion pp. 7-8) and the quotation set forth from that case in n.19 *infra*.

[17A] 250 tenth and eleventh graders will become eligible for busing as will 1972 junior high students and 10,248 elementary school students, or a total of 12,290 for the school population from kindergarten through the eleventh grade.

there is no way to achieve desegregation at the elementary level within the *Brown-Swann* standards without assigning some students to an elementary school which is not the nearest elementary school to the student's home. In an effort to comply with *Brown-Swann* standards and at the same time to keep each child at a school as close as possible to his home, the staff plan calls for the establishment of 11 elementary school geographic sectors. No student living within any sector will be attending school outside of that sector.[18]

No one has ever suggested that the neighborhood school concept is not attractive, and all other things being equal, preferable to any other guiding concept. But *Swann* teaches that it cannot rigidly be maintained to thwart desegregation,"[19] particularly where a substantial number of the

[18] The Introduction to the staff plan states:

> A sincere effort was made to keep communities together and not involve the same neighborhoods at all three educational levels. Where communities have been affected at all levels, it was unavoidable.

[19] "The School Board does not contest the fact that any further substantial desegregation cannot be accomplished without the transportation of school children; nor as discussed in the preceding paragraphs is there any reason to believe that such further desegregation is not required. Nevertheless the School Board opposes the use of busing in this case. Its position is simple: the use of compulsory busing for desegregation purposes is unwise and counterproductive. In short, the School Board argues, busing for the purposes of desegregation 'is wrong.'

"The Supreme Court has, of course, come to the opposite conclusion in a recent unanimous decision, holding that 'bus transportation' in one 'tool of desegregation' which school authorities may be required to use. *Swann, supra*, 402 U.S. 1, 30. Recognizing this to be the holding of *Swann*, Defendants nevertheless suggest that we come to a contrary conclusion on the basis of a single piece of much criticized sociological research, the conclusions of which are, by its own terms, inapplicable to the Southern School pattern. It would be presumptuous in the extreme for us to refuse to follow a Supreme Court decision on the basis of such meager evidence. *Swann* is controlling and requires us to sanction the use of bus transportation as a tool of desegregation when, as here, such busing is necessary to accomplish the dismantling of the dual system and its use does not pose intolerable practical problems.

"With respect to this latter point we note that the most serious practical problem which busing commonly present—that of requiring children

schools opened on a predominantly one-race basis after 1954 and even after the *Green* opinion of May, 1968. Additionally, it must be noted that in Prince George's County, transportation to school on school buses is not presently, at any school level, the exception. Rather, busing is an existing condition for nearly one-half of the entire student population and more than one-third of the elementary school population. As the charts set forth *supra* reveal, over 48% of the students are currently eligible for busing. That percentage under the staff plan will be increased to about 56%. The percentage increase a bit over 1% for the senior high students, between 4% and 5% on the junior high level, and a bit over 11% on the elementary school level.

On October 12, 1972, in its per curiam opinion in the interlocutory appeal in this case, the Fourth Circuit wrote [20] that this Court's August 31, 1972 Order

> scheduled a hearing on the plans in December and provided that the plans, with respect to the primary

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to spend an excessive amount of time on the buses—is not a factor in this case. Under the plan adopted by the District Court the maximum time to be spent on the buses by any child is 34 minutes—slightly less than the maximum time involved in the *Swann* case and there found acceptable. See 402 U.S. at 30." [Northcross v. Board of Education of Memphis, *supra* at slip opinion pp. 6-8 (footnotes omitted).]

Moreover, the following words used by the Chief Justice in Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1951), an opinion filed on the same day as *Swann*, may not be disregarded:

> As we have held, "neighborhood school zoning," whether based strictly on home-to-school distance or on "unified geographic zones," is not the only constitutionally permissible remedy; nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. See Swann, supra, at 22-31. The measure of any desegregation plan is its effectiveness.

[20] Slip opinion at pp. 4-5.

schools and the junior high schools, would be made effective on January 29, 1973, the date of the semester break. With respect to the senior high schools, however, the order provided that the plans would not be placed into effect until September 1973.

The right to take an appeal from each of the orders under the present circumstances is contested, and the resolution of those procedural questions involve difficult considerations. We think it unnecessary to attempt to resolve them, for we perceive among the substantive questions tendered, only one of substantiality, and that one is, and will be, within the bosom of the District Court.

The general rule requires that plans for the desegregation of school systems be made effective as soon as they practically may be without serious disruption to the educational process.* It is contended here that, in light of the general rule the District Court should not have included in its August 1972 order a provision postponing implementation of the plan with respect to the senior high schools until September 1973. With the possible exception of the twelfth grade, the graduating class, it is difficult to find justification for that portion of the order on this record, when the plans are as yet unformulated and the advantages of coordinating the change at all levels cannot be weighed against what difficulties may be encountered in the implementation of the plan for the senior high schools at mid semester.

It seems clear to us, however, that the timing of the implementation of the plans, when approved, at all levels is subject to reconsideration in the District Court in light of the actual plans and the extent of the changes within the school system which their implementation will require.

This question should first be addressed to the District Court and considered by it in light of the situation as it shall appear when otherwise approvable plans are in hand.

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* Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969).

> Since there appears to be no substantive issue of substantiality ready for decision in this Court, we need not undertake resolution of the procedural questions. The case will be remanded for further proceedings in the District Court.

Defendants seek delay in the implementation of the staff plan at any and all levels until September, 1973. All parties to this case are agreed that the present 12th graders should not be required by a desegregation plan to transfer to another school in mid-term of the 1972-73 school year, in view of the proximity of their graduation in June, 1973.

The postponement of implementation with regard to the twelfth grade from January 29, 1973 to September, 1973 will cause, under the staff plan, an additional one-time cost of about $56,000 and will apparently not interpose too many difficulties in the implementation in January, 1973 as to the other eleven grades. A definite conclusion in that latter regard is not possible because of the defendants' failure to submit at any time many of the details called for by this Court's November 14, 1972 Order.[21] Nevertheless, the exclusion of the graduating class obviously makes sense. In that connection, the approval of similar exclusions in *Brewer* v. *School Board of City of Norfolk, Virginia*, 456 F.2d 943, 945-46 (4th Cir. 1972), and in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 311 F.Supp. 265, 270 (W.D.N.C. 1970), is noted. Accordingly, the implementation of the 12th grade changeover will be delayed until

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[21] *See* the Memorandum filed by this Court on December 13, 1972, pp. 4-5.

As to costs generally, the staff has estimated the costs of implementation at about $1,100,000 per school year plus the cost of new equipment. However, those cost figures are averages based upon, and extensions of, existing costs and may well be substantially reduced by additional study and by experience. They were arrived at by staff members with little, if any, time for cost analyses. In any event, the appropriate governmental authorities have the duty to provide the funds necessary to operate a school system in Prince George's County in conformity with constitutional standards. Griffin v. School Board of Prince Edward, 377 U.S. 218, 232-33 (1964).

September, 1973. There will, however, not be any delay beyond January 29, 1973 as to any other grade.[22]

The existence of electives and semester courses in all three senior high grades—the 10th, 11th and 12th—plus other problems in connection with a mid-year shift, was noted in this Court's August 31, 1972 opinion.[23] Evidence presented in this case in August, 1972 caused this Court to become quite concerned about a mid-year changeover in any of the three senior high grades. That concern still exists and indeed has been buttressed by evidence presented during the current month of December, 1972 and as late as December 26, 1972. But this Court must take note of the Fourth Circuit's comment in its October 12, 1972 per curiam opinion in this case that on the then current state of the record "it is difficult to find justification" for the delay in the senior high changeover from January 29, 1973 to September, 1973, "[w]ith the possible exception of the twelfth grade."[24] The additional evidence and argument received in this Court since the Fourth Circuit so wrote is revealing but is either only cumulative or only supportive. The additional evidence does supply more details to buttress the August testimony as to disruption of schedules and difference in course treatment at various schools both as to content and time of availability. But in essence the evidence received in this Court since the Fourth Circuit spoke in this case is not new and simply justifies this Court's acceptance of the August evidence as reliably presenting the difficulties which were described to this Court in August. Additionally, this Court's further

[22] The Introduction to the school staff plan states: "Attempts were made to retain the kindergarten pupils in their respective schools for the remainder of the 1972-73 school year. However, complications are present with regard to teacher assignment, transportation schedules and splitting of families at the elementary level."

[23] At pp. 10-11.

[24] Slip opinion, p. 5.

reading of the Supreme Court and Fourth Circuit opinions discussing delay [25] has convinced it that what was true in the Darlington, South Carolina case in 1970, when a mid-year implementation of a school desegregation plan required transfers within a 58,000 school population (slightly more than 30% the size of the current school attendance in Prince George's County), is true in this case, namely:

> Whatever the state of progress in a particular school district and whatever the disruption which will be occasioned by the immediate reassignment of teachers and pupils in mid-year, there remains *no judicial discretion* to postpone *immediate* implementation of the constitutional principles as announced in *Green* . . .; *Alexander* . . .; [and] *Carter*. . . .[26]

Those words appear in an opinion filed *January 19, 1970* ordering implementation on *February 9, 1970* or if absolutely necessary as late as *February 16, 1970.* During

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[25] *See* the discussion in this Court's December 13, 1972 Memorandum, pp. 13-14.

[26] Chief Judge Haynsworth writing in Stanley v. Darlington County School Dist., 424 F.2d 195, 196 (4th Cir. 1970) (emphasis supplied; full citations omitted). An analysis of the Supreme Court's statements as to delay indicates the reasons for the strength of Judge Haynsworth's words. Thus, in Carter v. West Feliciana School Board, 396 U.S. 290 (1970), there was a mid-year implementation of a desegregation order, apparently affecting all grades (at 294). Mr. Justice Harlan and Mr. Justice White, in a concurring opinion, expressed the view that the "maximum" timetable for implementing a desegregation plan (including times for judicial review) after a finding of *de jure* segregation was eight weeks (at 293). Four of the Justices, Black, Douglas, Brennan and Marshall, thought the views of Justices Harlan and White represented a retreat from the requirements of Alexander v. Holmes, 396 U.S. 19 (1969), and thus disagreed with Mr. Justice Harlan's concurrence. Presumably, those four Justices thought eight weeks was too long a timetable to effect a desegregation order after a finding of non-compliance with *Brown I.* The Chief Justice and Mr. Justice Stewart stated that they would not have peremptorily reversed the Fifth Circuit since "[t]hat court is far more familiar than we with the various situations of these several school districts . . . and has exhibited responsibility and fidelity to the objectives of our holdings in school desegregation cases" (at 294). None of the Justices, other than perhaps the Chief Justice and Mr. Justice Stewart, stated or implied that educational disruption would justify waiting beyond the eight-week max-

oral argument on December 26, 1972, counsel for defendants informed this Court that the District Court record in the *Darlington* case discloses that the mid-year transfer plan involved about one-tenth of the Darlington school population whereas the staff plan in this case will call for transfers of about one-sixth of the students in Prince George's County. Also, in his closing oral argument, counsel for the School Board urged upon this Court the contention that the principles of *Green*, *Alexander*, *Carter*, and *Darlington*, requiring that constitutionality required changes not be delayed until the commencement of the following school year and that such changes be made as promptly as possible during a school year, are not necessarily applicable to a school system as large as that of Prince George's County. But there is no indication in any decided case, known to this Court, including the currently

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imum. Further, there is no Supreme Court opinion which indicates that educational disruption *per se* justifies any delay in implementing a desegregation plan.

In *Alexander*, the Court ordered the immediate implementation of a desegregation order (at 20) in mid-year without any discussion of possible educational disruptive effects. *See also Alexander* on remand, 423 F.2d 1265 (5th Cir. 1969). *And see also* Cooper v. Aaron, 358 U.S. 1 (1958). In that case, the Little Rock School Board sought to delay the desegregation of schools after racial animosity in the community almost assured that violence and educational disruption would occur (358 U.S. at 15). The Supreme Court refused any delay stating (at 16):

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Buchanan v. Warley, 245 U.S. 60, 81. . . . Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

pending Memphis case [27] involving a system comprised of about 145,000 students and the currently pending Atlanta case [28] involving 94,979 school students that if the school staff plan presented in this case is, as defendants have informed this Court, ready for mid-year (i.e., January 29,

[27] In the Memphis desegregation case, the District Court, after the Sixth Circuit's August 29, 1972 opinion in Northcross v. Board of Education of Memphis, —— F.2d —— (6th Cir. 1972), recently ordered on September 26, 1972 the implementation, on January 22, 1973 (the beginning of the second semester), of the first of two phases of a desegregation plan applicable to most of the elementary and junior high schools but only a relatively small number of senior high school students. The second phasee of the plan is not expected to be ready for implementation until the fall of 1973. By contrast, the entire staff plan in this case, as applied to all levels of education, is ready for implementation on January 29, 1973 subject only to the educational soundness of implementation of that date, or to put it another way, subject only to the educational reasons for delaying the implementation, in whole or in part, until September, 1973. It is also to be noted that the Sixth Circuit (slip opinion, p. 2) stated that it was "[m]indful of the need for speedy implementation of appropriate desegregation orders" and cited *Alexander, Carter* and *Green*. Thus, clearly, the Sixth Circuit considered the principles of those cases applicable to a large school system such as the one existing in Memphis which in size is nearly equal to that of Prince George's County.

[28] The Atlanta School case has been in litigation since 1958. The recent decisions in that case filed subsequent to the Supreme Court decisions in *Green, Alexander, Carter* and *Swann* give no support to the proposition that the constitutional standards required for school desegregation, including matters of timing, are inapplicable to large school systems. In Calhoun v. Cook, 332 F.Supp. 804 (N.D. Ga. 1971), the Court held that if the Atlanta School Board adopted certain plans (excluding busing) to increase desegregation, then the Atlanta school system would be declared unitary and a dismissal of the desegregation suit would be ordered on January 1, 1972. Apply the constitutional standards set forth in *Swann*, the District Court refused to require busing to maximize desegregation because the "distances alone would require 40 minutes or more for each child transported and all of this [busing] would have to be achieved by a system which has no [school] busses, no [school bus] drivers, and no funds with which to acquire and operate them" (at 808). In contrast to *Calhoun*, the desegregation remedy in this case involves bus rides, averaging only 14 minutes in a school system which already buses nearly 50% of its students. Moreover, the implementation in this case of the staff plan involves busing only an additional 7.7% of the student population. The District Court's decision in the Atlanta case was appealed to the Fifth Circuit, which in Calhoun v. Cook, 451 F.2d 583 (5th Cir. 1971), vacated that portion of the District Court's opinion dismissing the action as of January 1, 1972, and remanded the case to the District

1973) implementation as to all levels (elementary, junior high and senior high), that any such implementation should be delayed until the start of the next school year, i.e., September, 1973.[29]

Court to evaluate a proposed alternate plan. After procedural developments on remand threatened the delay of the implementation of a desegregation plan, the Fifth Circuit issued an interim order on October 6, 1972, Calhoun v. Cook, No. 72-2453, in which the court stated:

> Faced with the inevitable delay in devising a final resolution of the appellate issues which this latest district court procedural development portends, we are required to consider interim measures which will desegregate this system now. Alexander v. Holmes County, 396 U.S. 19 (1969).
>
> The Atlanta Public School System is hereby directed to proceed forthwith to prepare and submit to this court a student assignment plan to be effective at the commencement of the second quarter Nov. 27, 1972 * * *.

(Slip sheet, p. 2, ¶ ¶ 2 and 3). Notably, the Fifth Circuit cited *Alexander* in support of its order that Atlanta desegregate "*now*" (emphasis in original) with no indication that the constitutional standards set forth in *Alexander* concerning the speed with which desegregation plans must be implemented are not applicable to large school systems like Atlanta's. On November 6, 1972, Mr. Justice Powell denied a request for a stay of the Fifth Circuit's October 6, 1972 interim order. On November 24, 1972, the Fifth Circuit, in a final order in Calhoun v. Cook, No. 72-2453, vacated the findings and conclusions of the District Court determining that the Atlanta Public School System as now operated is non-discriminatory and unitary, and remanded the case to the District Court to, *inter alia*, "enter an appropriate order requiring the Atlanta Public School System to prepare and submit to the district court a comprehensive desegregation plan covering student assignments in accordance with the guidelines contained in this Court's interim order of October 6, 1972 * * *" (Slip sheet, pp. 2 and 3). Significantly, there was not a single statement, either express or implied, in any of these decisions concerning the desegregation of Atlanta schools that the constitutional standards in desegregation cases set forth by the United States Supreme Court, especially those set forth in *Brown I, Green, Alexander, Carter* and *Swann* are not appropriate with regard to large school systems involving around 100,000 students like the one in Atlanta.

[29] In Robinson v. Shelby County Board of Education, 442 F.2d 255, 258 (6th Cir. 1971), Judge McCree specifically noted that the then current school year was almost over and delayed in an opinion *filed May 10, 1971* the change until the start of the 1971-72 school year. But that hardly speaks in support of the delay until September, 1973 requested herein by defendants; indeed by implication it would seem to speak to the contrary.

In August of this year, this Court ordered the elementary school changeover to be effective January 29, 1973. The Fourth Circuit's observation in its October 12, 1972 opinion that "we perceive" only one substantive question "of substantiality"[30]—and that question is whether delay of implementation of the senior high plan until September 1, 1973 is appropriate—would seem, despite the Fourth Circuit's indicated suggestion that this Court also consider the question of delay at all levels of education after it had before it all of the evidence, to require this Court to pause most carefully before postponing any changeover, at any level, beyond January 29, 1973. The School Board itself, in its resolution of August 1, 1972, proposed to implement changes as to all but elementary schools either before or at the latest by mid-year in January, 1973. Transfers are usually unwelcome at any time—but they hardly are as difficult for an individual student to adjust to if the student is one of many being transferred. The disruption of education, particularly of older students, by mid-year transfers has already been recognized by this Court in its August 30, 1972 opinion and *supra* herein. But, to make what is at best a most difficult decision, this Court concludes that as a matter of law, the defendants have not borne the burden of establishing reasons for delay beyond January 29, 1973 with regard to any grade other than the 12th grade. Accordingly, this Court is of the opinion that it does not have the discretionary authority to permit any such delay. But even if this Court did have such authority, this Court is far from certain that any further delay is advisable. The present disruptive effects of delay with its current unsettling effects upon students and parents speaks from the record in this case. Such an atmosphere can hardly be conducive to maximum educational accomplishment. Views to that effect were expressed candidly and vigorously by

[30] Slip opinion, p. 4.

one School Board member and by one high school principal in testimony before this Court last August. Additionally, the policy and the practice apparently followed by a number of the School Board members,[31] of seeking at every stage and at every available moment, ever further delays, and of failing to exert affirmative leadership to effect required constitutional change, discourages further delay until September, 1973. But, in any event, in the view of this Court, the record in this case adds up to a lack of existence of discretion by this Court to permit delay beyond January 29, 1973 in view of the failure of defendants to shoulder their very heavy burden of showing the necessity of any further delay. In that connection, the record reflects that the School Board's emphasis in July, in August, and again in December of 1972, has been to seek and to justify delay; rather than to find the most palatable ways in which to change an unconstitutional school system which defendants have had over 18 years to cure. The record indeed even reflects that the determination, on the part of the School Board, to delay was so great that during the months between August 31, 1972 and December 7, 1972 the Board failed to give a sufficient green light to its very able staff members to enable them to ready a plan meeting *Brown-Swann* standards. Since December 7, 1972, the time which has elapsed has been requested and has been sorely needed by those staff members. Fortunately, their efforts in this month have proven most fruitful and have provided a workable constitutional plan, deemed education-

[31] In early July, 1972, in chambers conferences among Court and counsel, this Court was informed that the Board was deadlocked 4 to 4 in connection with the approval of a plan which plaintiffs' counsel believed met constitutional requirements and would recommend to this Court. That plan failed to gain more than 4 votes and was stillborn by a 4-4 tie. Indeed, at all times since July, 1972, this Court has been informed that at no time has there been more than 4 out of 8 or 9 members who were ready to recommend to this Court *any* plan which in the opinion of this Court even approaches compliance with constitutional standards.

ally sound by plaintiffs and defendants alike, and ready for implementation—using that urgent word employed in *Green* (at 439), *"now"*.

The School Board is today being ordered, in a separate document, to implement the plan attached thereto, i.e., the staff plan submitted December 26, 1972,(a) on January 29, 1973 as to all grades except the 12th grade, and (b) as to the 12th grade at the commencement of the 1973-74 school year in September, 1973. That Order, in this Court's opinion, is a final Order as to the issue of student attendance. Other issues pertaining to faculty, administration, school construction, and legal fees and reimbursable costs of plaintiffs and their counsel are reimbursable costs of plaintiffs and their counsel are reserved for subsequent determination by this Court. Additionally, this Court will, for the time being, retain jurisdiction as instructed by the Supreme Court in *Raney* v. *Board of Education*, 391 U.S. 443, 449 (1968), with regard to the student attendance plan being approved and decreed today, in order that this Court may supervise the implementation of the same.

/s/ Frank A. Kaufman
United States District Judge

EXHIBIT "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-375-K

SYLVESTER J. VAUGHNS, JR., ET AL.

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.

Memorandum

The Issues in this Case

This case presents the issue of whether Prince George's County School Board (the Board) is:

(1) maintaining its public school system [1] in violation of the commands of the Constitution of the United States; and

(2) if so, what relief is required; and

(3) how and when that relief should be implemented.

[1] The tenth largest in the United States. Questions relating to student attendance, faculty, administration and school construction have been raised. By agreement of Court and counsel, priority attention has been focused upon student attendance, in connection with which the taking of evidence and the presentation of argument are expected to be concluded in this Court within the current month of December, 1972. As early as feasible thereafter questions relating to faculty, administration and school construction will be considered, in and of themselves; at present, they are considered only as they may be interrelated to the question of student attendance. *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18-19 (1971), and cases therein cited. On a tentative basis, counsel are agreed that current faculty assignments and proposals probably meet federal constitutional standards and that administration seemingly does not present a particularly difficult issue. The issue of school construction, described by the Chief Justice in *Swann* (at 21) as among "the most important functions of local authorities" and also as one of "the most complex," has been considered only to the extent that shortly after the commencement of this suit the School Board has stipulated that any new construction which it undertakes will not adversely affect the relief if any to which plaintiffs are entitled herein.

History of this Case and Purposes of this Memorandum

This suit was instituted on March 29, 1972. On July 25, 1972, this Court filed an Opinion in which it concluded (at 6)[2] that the federal constitutional standards enunciated by the Supreme Court of the United States[3] "command a discontinuation of the current lack of desegregation in the schools of Prince George's County. That lack stems from a pre-*Brown I* segregated system which has never been effectively dismantled and which was not, in its origin, 'a consequence of other types of state action, without any discriminatory action by the school authorities' (*Swann* at 23)." That holding was compelled by the facts in this case, jointly stipulated by the parties, which reveal the great concentration of white students in some schools and black students in others.

The history of this case, to and including December 4, 1972, is set forth in the documents in the official court file in this case. That history will be referred to but will not be reviewed in any great detail in this Memorandum, the incidental purpose of which is to update the history of this case but the main purposes of which are to review the legal principles which control the determination of the issues presented and to chart the course which Court, counsel and parties will follow.

The July 25, 1972 Order and Opinion of this Court called for both the Board and a consultant hired by it[4] to present

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2 All page references to earlier documents filed in this case are to the pages of those documents appearing in the official court file.

3 Brown v. Board of Education, 347 U.S. 483 (1954) (*Brown I*); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

4 In the July 25, 1972 Opinion, it is noted that "the Board of Education of Prince George's County (Board) entered into a contract dated June 30, 1972, utilizing funds made available to the Board by the federal Department of Health, Education and Welfare, with the Lambda Corporation, a corporation with its principal office in Arlington, Virginia (Lambda), to make a study and a presentation to the Board with the objective 'to assist Prince George's County in the development of a desegregation plan in which specified desegregation objectives are met with a minimum of student transportation.' The commencement date for the study was the latter part of the month of June, 1972." (July 25, 1972 Opinion of this Court, p. 6 (footnotes omitted)).

student attendance plans to this Court by August 22, 1972 "so as to bring the Prince George's County school system into total compliance with the *Brown-Swann* standards to the fullest extent possible by September 5, 1972, or if that is not feasibly possible, then to bring that system into such compliance in part to the fullest extent possible by that date. The burden of establishing the need for any delay or delays in whole or in part shall rest upon defendants.[5]

On August 22, 1972, the School Board filed a report. Following lengthy hearings which included interim testimony by an official of the School Board's consulting firm, this Court filed an Opinion on August 31, 1972 in which it rejected the plaintiffs' plea for implementation of any desegregation order effective September 5, 1972, even as to the tenth and eleventh grades, finding that such early implementation could only become effective if seventeen senior high schools were to remain closed for a period approximating one month. In its August 31, 1972 Order, this Court required that "the desegregation plans for all three levels, elementary, junior high and senior high, should be coordinated and completed at one time. Such a total proposed overall plan shall be presented to this Court on or before December 4, 1972."[6] Additionally, for reasons stated in the August 31, 1972 Opinion, this Court concluded that the change-over at the elementary and junior high levels should become effective January 29, 1973 at the beginning of the second half of the 1972-1973 school year and that the change-over affecting the tenth and eleventh grades should occur in September, 1973. Counsel for all parties have suggested almost from the beginning of this case, and the Court has tentatively concurred, that no changes with regard to the twelfth grade should become effective until September, 1973.

On October 12, 1972, in a per curiam opinion, the Fourth Circuit, sitting *en banc* in connection with an interlocutory

[5] July 25, 1972 Opinion of this Court, p. 8.

[6] August 31, 1972 Opinion of this Court, p. 11.

appeal in this case, wrote [7] that it "perceive[d] among the substantive questions tendered only one of substantiality," namely, "justification for that portion of the order on this record, when the plans are as yet unformulated", which postpones implementation of the tenth and eleventh grade change-over until September, 1973.

Subsequently, in an Order [8] calling attention to the Fourth Circuit's opinion, this Court required that the School Board submit by December 4, 1972:

> (1) A plan pursuant to which the changeover (a) with regard to the tenth and eleventh grades would take place on January 29, 1973 at the same time as the changeover will take effect with regard to the elementary and junior high schools, and (b) with regard to the twelfth grade would take place in the fall of 1973; and
>
> (2) A plan pursuant to which the changeover with regard to the tenth, eleventh and twelfth grades would take place on January 29, 1973 at the same time as the changeover will take effect with regard to the elementary and junior high schools; and
>
> (3) A plan pursuant to which the changeover with regard to the elementary and junior high grades will take place on January 29, 1973 and the changeover with regard to the tenth, eleventh and twelfth grades would take place in the fall of 1973. In connection with that said third alternative plan, all parties are hereby requested, on the one hand, to present to this Court all available facts and opinions with regard to the alleged deleterious effects of a mid-semester changeover with regard to the tenth and eleventh grades, and, on the other hand, all available facts and opinions

[7] Slip Sheet Opinion, p. 5.

[8] On November 14, 1972, embodying contents of a letter from Court to counsel dated October 19, 1972.

with regard to, using the Fourth Circuit's words, the "advantages of coordinating the change at all levels" at the same time. Further, counsel for both sides are asked to file with this Court, as soon hereafter as possible and in any event no later than November 15, 1972, citations of cases in which federal courts have ordered mid-year changeovers or changeovers at times other than the commencement of the academic term in the fall of the year.

Developments Beginning December 4, 1972

On December 4, 1972 and since that date the School Board has presented a number of alternative plans to this Court, several of which are variants of the principal approach adopted by the School Board. Hearings have been commenced but not completed in connection therewith, and some testimony has been taken. In addition, this Court, with the agreement of the parties and their respective counsel, has discussed on several occasions in chambers with counsel and the staff members to whom the School Board has delegated the major responsibility for preparing the detailed plans, the facts relating to each of the 232 schools in the system,[9] the legal principles which either require or do not require changes in each of them, the effect of transfers of students from one school to another upon still other schools, the effect of any transfer upon transportation schedules and costs, and, above all, the desirability of achieving constitutional standards with regard to desegregation and at the same time limiting the number of students who, by the impact of such standards, will

(1) be transferred to a school other than the one they would otherwise be attending;

(2) become school bus riders rather than walkers; or

(3) be caused to ride additional miles on school busses.

[9] 173 elementary, 41 junior high, and 18 senior high.

In its August 31, 1972 Opinion, this Court noted[10] that an official of the consulting firm engaged by the School Board had testified that he believed that his firm's "proposals, when completed and coordinated with the plans of the school staff, will permit desegregation of the entire school system, including all twelve grades, without additional transportation expense and perhaps at a reduced total transportation cost; and without involving more than a minimum increase in the total number of students transported, in the miles each such student would be transported, and in the daily transportation time such additional transportation would require." Unfortunately, that "consummation devoutly to be wished"[10A] is not in the cards. There is seemingly nothing to be gained by any further consideration of the reasons why the joint efforts of the staff of the School Board and of the consulting firm have not proved fruitful and why the School Board has at its own request been permitted by this Court to continue without the aid of the consultants. The record in this case sufficiently reveals the history of the relationship.[11] Nor does this Court believe that any current attention should be devoted to plaintiffs' December 4, 1972 petition to this Court to cite the defendants for contempt of its preceding Orders. That petition is hereby denied. While, for reasons discussed below, this Court does not believe that any plan yet presented by the School Board attains constitutional dimensions, it does not find that there has been conduct amounting to contempt. On the other hand, the record discloses repeated and continuing attempts by the School Board to avoid changes required by the law, to develop varying methods for circumvention of the law, to delay any changes which are Court-ordered, and to state as reasons

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10 August 31, 1972 Opinion of this Court, p. 7.

10A *Hamlet*, Act III, Scene 1.

11 This Court at one point believed that it might have proved helpful, during the post-December 4, 1972 hearings, to hear further from one or two Lambda officials. However, in the absence of any request by any such official to appear, there would seem to exist no current reason for such testimony.

for delay, problems which are capable of at least partial solution without the sacrifice of constitutional rights and principles.

The Law

The Charlotte-Mecklenburg school system involved in the *Swann* case had about 84,000 students of 107 schools in the 1968-1969 school year, of which about 29% were black and 71% white.[12] In this case, the current Prince George's County school population is about 160,000, approximately 22.4% of whom are black and 77.6% white.[13] The areas in both cases are large—in *Swann*, "550 square miles—spanning roughly 22 miles east-west and 36 miles north-south";[14] in this case, 485 square miles, with according to counsel and school staff, the maximum cross-country road distance between any two points about fifty miles. At the inception of both cases, there were a large number of schools, particularly, at the elementary level, which were clearly identifiable either as predominantly black or predominantly white. Writing for a unanimous Supreme Court, Mr. Chief Justice Burger wrote in *Swann* at 11-12):

> Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.
> * * *

The opinion then reviewed the decisions of our highest Court since the pronouncement of *Brown I* that

> in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. * * * [15]

[12] *Swann, supra* at 6-7.

[13] July 25, 1972 Opinion of this Court, p. 4.

[14] *Swann, supra* at 16.

[15] *Brown I, supra* at 495.

In *Green*,[16] in 1968, the Court had written:

> The burden of a school board today is to come forward with a plan that . . . promises realistically to work *now* . . . until it is clear that state-imposed segregation has been completely removed.[17]

In *Green*,[18] the Court had also stressed that it is the school officials who are

> clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

In *Swann*, Mr. Chief Justice Burger wrote (at 15):

> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. * * *

In this case, the Prince George's County School Board, despite repeated warnings by officials of the federal Department of Health, Education and Welfare (HEW), and in the face of debate and discussion at countless board meetings, has continued, up to the present time, as is recited in this Court's July 25, 1972 Opinion, to operate a system (which at the time of *Brown I* in 1954 was segregated by state law) under standards rejected by the Supreme Court in *Green* and again in *Swann*. *Swann* is written in detailed and easily understandable language. No counsel, or staff expert, who has participated in discussions with Court or counsel, has indicated any lack of understanding of *Swann*. And yet the School Board has persisted, until the end of last week, in presenting views and plans to this Court which are clearly violative of

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16 Green v. County School Board, 391 U.S. 430 (1968).

17 *Green, supra* at 439.

18 *Green, supra* at 437-38.

Swann, a decision binding upon this Court and also upon the Prince George's County School Board, and every court and school board throughout the land. "This," as Judge MacMillan wrote in the District Court in *Swann*, "is a matter of law, not anarchy; of constitutional right, not popular sentiment."[19]

In this case, the School Board itself determined as one of its major desegregation aims to decrease to 35%, wherever feasible, the black population of any school currently having a school body more than 50% black. Neither this Court nor plaintiffs' counsel opposed that aim, nor an alternative planning proposal changing the 35% to 40%. But this Court has repeatedly sought a flexible approach, not keyed to or restricted by any foreordained mathematical formula, and has called attention to Mr. Chief Justice Burger's words in *Swann* (at 24):

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

Again, only last June, Mr. Justice Stewart, in the majority opinion in *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972), and the Chief Justice in his dissenting opinion, warned of the need to reject any requirement of a fixed racial percentage.

Those plans which have been presented to date by the School Board have by their own adherence to one or more fixed mathematical percentages called for more student transfers from school to school and the transformation of more walkers into bus users, than is necessary. Apparently, by so proposing, the School Board hoped to convince this

[19] 311 F. Supp. 265, 267 (W.D.N.C. 1970).

Court to leave undisturbed many schools, particularly neighborhood elementary schools, whose current black-white populations place them within the category of one-race or largely one-race schools and most of whose students can walk to school. That result cannot obtain. While "[i]n some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change [20] and while "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," [21] nevertheless:

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.[22]

Noting the use of tools such as gerrymandering of school districts and attendance zones, and pairing, clustering and grouping of schools, the *Swann* Court states:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be

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20 *Swann, supra* at 25.

21 *Swann, supra* at 26.

22 *Swann, supra* at 26.

> administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.[23]

And, continuing, the *Swann* opinion officially approved the bussing portions of the District Court's decree (at 31-32) under the circumstances of that case.

The plans presented to date to this Court would result in the elimination of many one-race schools, but would leave a large number in existence. While a few such situations might well be justifiable in view of the great distances between certain schools, the continuation of many one-race schools, simply to avoid turning walkers into users of busses, cannot be permitted. That is a major lesson of *Swann*. The neighborhood school concept, no matter how attractive, cannot, at the elementary or any higher level, compel a continued pattern of unconstitutional segregation.

A school-by-school analysis of each of the units within Prince George's County, under the guidance of School Board staff experts, has been and is being made by Court and counsel in this case. Hopefully, within the next ten days, and certainly if at all possible before Christmas, revised plans which meet the *Brown-Swann* tests will be submitted and will be the subject of evidentiary hearings. Counsel for the School Board and counsel for the intervenors, while cooperating fully with this Court and plaintiffs' counsel in the consideration of desegregation plans, have stated candidly that they will seek delay in the implementation of such plans, whatever provisions they may contain, until at least September, 1973, even though all of such counsel have noted their recognition of the heavy burden placed upon those seeking delay by *Green*, *Alex-*

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[23] *Swann*, *supra* at 28.

ander,[24] *Carter*[25] and *Swann* and by the Fourth Circuit's statement in its per curiam opinion in this case. The principles set forth in those cases are not inapplicable in connection with a mid-year change-over. Thus, in *Stanley* v. *Darlington County School Dist.*, 424 F.2d 195 (4th Cir. 1970), Chief Judge Haynsworth ordered a mid-year change, stating (at 196): "Whatever the state of progress in a particular school district and whatever the disruption which will be occasioned by the immediate reassignment of teachers and pupils in mid-year, there remains no judicial discretion to postpone immediate implementation of the constitutional principles as announced in" *Green*, *Alexander* and *Carter*. Even more significantly, in the *Darlington* case, the Fourth Circuit stated (at 197) in denying a petition for rehearing: "It is true . . . that a general reassignment of 58,000 pupils and their teachers at this time of year will occasion great disruption, and that much educational advantage may be lost through the process of readjustment. The court, however, was not unmindful of these things at the time of entry of its order" (at 197). And in *Nesbit* v. *Statesville City Bd. of Education*, 418 F.2d 1040 (4th Cir. 1969), the Fourth Circuit, in the light of *Alexander*, ordered mid-year change-overs without discussing whether educational disruption would justify delay.

The likelihood of an appeal from this Court's final Order[26] will be kept in mind. To that end, expedited copy

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[24] Alexander v. Holmes County Board of Education 396 U.S. 19 (1969).

[25] Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1969).

[26] Any contention that the provisions of section 803 of the Education Amendments of 1972, Pub. L. 82-318, § 803 (June 23, 1972), providing for postponement of the effect of certain federal District Court orders "until all appeals . . . have been exhausted", applies herein, has seemingly been rejected in four separate individual Orders by Mr. Justice Powell in Drummond v. Acree, —— U.S. —— (September 1, 1972); by Mr. Justice Rehnquist in Board of Education of Okla. City Public Schools, et al. v. Robert L. Dowell, —— U.S. —— (August 23, 1972), and Metropolitan County Bd. of Education of Nashville, et al. v. Kelley, et al., —— U.S. —— (August 28, 1972); and by Mr. Justice Douglas in Guinn v. Kelly, —— U.S. —— (September 5, 1972).

is being provided of all evidentiary hearings. However, as of this date, counsel for defendants and intervenors have asked this Court to permit them to delay the completion of the presentation of testimony until revised plans have been completed by the School Board staff. This Court, while acquiescing in that request, will do its best to complete these proceedings and file its final Order at the earliest possible date. That Order will be based upon the constitutional requirements enunciated by the Supreme Court; hopefully, it will also call for the adoption of *the* Plan selected by the Prince George's County School Board itself as that one among many constitutionally permissible plans which that Board creates as the most educationally sound and the one which best reconciles competing public and private interests.

/s/ FRANK A. KAUFMAN
United States District Judge

Dated: December 13, 1972

EXHIBIT "F"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2129

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; REGINALD WIGGS, by his father and next friend, HOSEA WIGGS; REGINALD A. JACKSON, JR., by his father and next friend, REGINALD A. JACKSON; DENISE A. LIGON, by her father and next friend, DENNIS J. LIGON, JR.; CAROLYN GILMORE, by her father and next friend, STERLING GILMORE; JOHN A. WILLIAMS, by his father and next friend, JOHN J. WILLIAMS, individually and on behalf of all other persons similarly situated, *Appellants,*

versus

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSELL, SUPERINTENDENT of Schools of Prince George's County, *Appellees,*

No. 72-2130

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; REGINALD WIGGS, by his father and next friend, HOSEA WIGGS; REGINALD A. JACKSON, JR., by his father and next friend, REGINALD A. JACKSON; DENISE J. LIGON, by her father and next friend, DENNIS J. LIGON, JR.; CAROLYN GILMORE, by her father and next friend, STERLING GILMORE; JOHN A. WILLIAMS, by his father and next friend, JOHN J. WILLIAMS, individually and on behalf of all other persons similarly situated, *Appellees,*

versus

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSELL, Superintendent of Schools of Prince George's County, *Appellants.*

No. 72-2131

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSELL, Superintendent of Schools of Prince George's County, *Appellees,*

versus

JESSE ALEXANDER ELLER, MARTHA STREET ELLER, BRENDAN EDWARD LYNCH, MARJORIE ELAINE LYNCH, KENNETH PHILLIP WHITTEMORE, BETTE ANN WHITTEMORE, ARTHUR EMANUEL DINERMAN, JANET AVIN DINERMAN, MORRIS EDWARD SAMPSON, THELMA OLINDA SAMPSON, WILLIAM RAYMOND LEER, MARGARET STREET LEER, LEO PAUL CHABOT, WANDA MAXINE CHABOT, JOHN EUGENE SPAULDING and BERNADINE LANE SPAULDING, *Appellant*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT MARYLAND, AT BALTIMORE. FRANK A. KAUFMAN, DISTRICT JUDGE.

(Argued October 2, 1972. Decided October 12, 1972.)

Before HAYNSWORTH, Chief Judge, and WINTER, CRAVEN, BUTZNER, RUSSELL and FIELD, Circuit Judges, sitting en banc.

Richard V. Falcon and Kenneth L. Johnson (Gerald A. Smith, and Howard, Brown and Williams on brief) for

Appellees in No. 72-21 and 72-2131 and for Appellants in No. 72-2130; Paul M. Nassbaum, Counsel for the Board of Education of Prince George's County, Maryland, (Stanley H. Goldstein on brief) for Appellees in No. 72-2129 and for Appellants in No. 72-2130; Emmett H. Nanna, Jr. (Richard M. James, George P. Lewnes and Cyril S. Wofsy on brief Appellants in No. 72-2131.

PER CURIAM:

In this school case, the District Judge entered an order in July 1972 declaring the composition of the schools and the assignment of pupils in Prince George's County Maryland not to be in compliance with the constitutional requirements. There was a subsequent order in August, directing the preparation of final desegregation plans by November 1972 and their submission to the Court early in December. That order scheduled a hearing on the plans in December and provided that the plans, with respect to the primary schools and the junior high schools, would be made effective on January 29, 1973, the date of the semester break. With respect to the senior high schools, however, the order provided that the plans would not be placed into effect until September 1973.

The right to take an appeal from each of the orders under the present circumstances is contested, and the resolution of those procedural questions involve difficult considerations. We think it unnecessary to attempt to resolve them, for we perceive among the substantive questions tendered, only one of substantiality, and that one is, and will be, within the bosom of the District Court.

The general rule requires that plans for the desegregation of school systems be made effective as soon as they practically may be without serious disruption to the educational process.* It is contended here that, in light of the

* Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969).

general rule the District Court should not have included in its August 1972 order a provision postponing implementation of the plan with respect to the senior high schools until September 1973. With the possible exception of the twelfth grade, the graduating class, it is difficult to find justification for that portion of the order on this record, when the plans are as yet unformulated and the advantages of coordinating the change at all levels cannot be weighed against what difficulties may be encountered in the implementation of the plan for the senior high schools at mid semester.

It seems clear to us, however, that the timing of the implementation of the plans, when approved, at all levels is subject to reconsideration in the District Court in light of the actual plans and the extent of the changes within the school system which their implementation will require.

This question should first be addressed to the District Court and considered by it in light of the situation as it shall appear when otherwise approvable plans are in hand.

Since there appears to be no substantive issue of substantiality ready for decision in this Court, we need not undertake resolution of the procedural questions. The case will be remanded for further proceedings in the District Court.

The mandate shall issue forthwith.

Remanded.

JUDGMENT

UNITED STATES COURT OF APPEALS

for the
Fourth Circuit
No. 72-2129
No. 2130
No. 2131

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; et als.,

Appellants,

versus

BOARD OF EDUCATION OF PRINCE GEORGE's COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County, et als.,

Appellees.

Appeal from the United States District Court for the -------- *District of* Maryland.

This cause came on to be heard on the record from the United States District Court for the ---------- *District of* Maryland *, and was argued by counsel.*

On consideration whereof, it is now here ordered and adjudged by this Court that the case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of this Court filed herewith. The mandate shall issue forthwith.

_____
CLERK

FILED
OCT 12 1972
WILLIAM K. SLATE, II
CLERK

EXHIBIT "G"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-325-K

SYLVESTER J. VAUGHNS, JR., ET AL.,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,

Filed: August 31, 1972

Richard V. Falcon, David S. Bogen, of Baltimore, Maryland, and Kenneth L. Johnson, Gerald A. Smith, of Baltimore, Maryland, and Alan J. Goldstein, of Oxon Hill, Maryland, for Plaintiffs.

Paul M. Nussbaum and Stanley H. Goldstein, of Mt. Rainier, Maryland, for Defendants.

Kaufman, District Judge.

On July 25, 1972, this Court filed an opinion in this case ordering desegregation within the tenth largest public school system in the United States and an end to lack of compliance with the constitutional standards enunciated by the Supreme Court in the *Brown* and *Swan* cases.[1] Pursuant thereto the Board of Education of Prince George's County (the Board) filed a report on August 22, 1972, and lengthy hearings were held commencing Friday, August 25, 1972, and terminating earlier today. The report and the record in this case demonstrates that since August 1, 1972 the school staff, in accordance with the Board's resolution of that date, has complied in good faith with this Court's July 25, 1972 Order and indeed has burned midnight oil

[1] Brown v. Board of Education, 347 U.S. 483 (1954); Brown v. Board of Education, 349 U.S. 294 (1955); Swain v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

in connection therewith. The August 22, 1972 report includes a proposed staff plan for desegregating, effective September 5, 1972, the senior high schools but excluding, for the school year 1972-1973 only, the twelfth grade, i.e., the senior class. Plaintiffs have no objection to that one-year exclusion and urge this Court to order the plan to become effective September 5, 1972 with regard to the tenth and eleventh grades for the school year 1972-73. Defendants, on the other hand, urge this Court not to order the implementation of any desegregation plan for any grade until the opening of the school year 1973-74 in September, 1973. On a secondary basis, defendants would have this Court order elementary school desegregation effective January 29, 1973, the date on which the second semester of the upcoming school year will commence, and delay implementation with regard to junior high and senior high schools until the fall of 1973. Defendants also contend that even if the junior high implementation is moved up to January 29, 1973, the senior high change should not become effective until the autumn of 1973. Defendants concede that under this Court's July 25, 1972 Order all grades should be desegregated no later than the opening of the school year, 1973-74.

On the other hand, plaintiffs ask this Court, as indicated above, to implement the proposed staff plan effective September 5, 1972 as to the tenth and eleventh grades, and also contend that this Court should require a new desegregation plan to go into effect on January 29, 1973 with regard to the elementary and junior high schools and in September, 1973 with regard to the twelfth grade. As is apparent, the only agreement between the parties as to dates of implementation of the required desegregation changes is that plaintiffs' like defendants, desire that any change with regard to the twelfth grade be delayed until the fall of 1973. However, there is also agreement among the parties that the proposed staff plan for the senior high school is educationally sound.

MISSING PAGES

That staff senior high plan was prepared during this month independently of the work being simultaneously done by The Lambda Corporation (Lambda). Testimony in this case would indicate, however, that the proposed tenth and eleventh grade plan could in all probability be coordinated with the Lambda proposals, when they are forthcoming, without any substantial additional expense, complication or delay. However, all of the testimony reveals that the staff plan cannot be implemented without delaying the opening of the tenth and eleventh, and also the twelfth, grades [2] for a period of at least two weeks. Indeed, except for one senior high school principal, called to testify by plaintiffs, all of the witnesses indicated the delay would be approximately one month in length.[3]

The superintendent of the schools and other witnesses testified that implementation of any desegregation plan without opportunity for planning and exchange of information among teachers, counselors, students and parents, would cause chaos and would lead to increased racial tensions. However, there was also testimony from the above-mentioned senior high school principal and from a Board member that such tensions are already at a high level and that they would be reduced if the desegregation plan for the tenth and eleventh grades went into effect this fall. On balance, this Court is convinced that, at this late date, it is not possible to implement the staff plan for the tenth and eleventh grades without delaying the opening of seventeen of the eighteen senior high schools for a period of approxi-

[2] The senior high class programs involve so much coordination and integration among the three grades (10th, 11th and 12) which compose it that it is apparently not possible to treat the twelfth grade in any given school separately from the tenth and eleventh grades in such school.

[3] The proposed senior high school plan alters the numbers of students attending seventeen out of eighteen high schools and requires reassigning some teachers from one school to another, consultation among administration, faculty, counselors, students and parents and many other steps which have yet to be fully programmed and which must be implemented when programmed. That will take time—how much can only be estimated.

mately one month and without bringing about great confusion in the operation of the school system and adding to the tensions which already exist.

The connection between those existing tensions and the failure by the Board to comply with the *Brown-Swann* mandates may not be overlooked. Further, the Board was most specifically advised by officials of the federal Department of Health, Education and Welfare (HEW) in the summer of 1971 that the Board was not in compliance with those mandates. Indeed, since August, 1971, the Prince George's County school system has not been eligible to receive certain new federal funds because of such noncompliance. Additionally, there was delay in mid-July, 1972 with regard to lack of cooperation by the Board with Lambda. Against that background, it is most regrettable that there should be any further delay. But what must govern the determination in this case are the facts which exist today and not the facts which might have existed had the School Board acted to bring itself into compliance with the *Brown-Swann* standards without this Court's Order, or had the School Board otherwise moved to correct the constitutional violations which have existed.

The Board bears a heavy burden to show the need for any delay [4] beyond September 5, 1972 in implementing the staff plan as to the tenth and eleventh grades.[5] But defendants have successfully shouldered that burden despite the delays which occurred prior to August of this year. The staff plan can only become effective in September, 1972 if seventeen of the eighteen senior high schools remain closed for a period which this Court believes will be approximately one month. The extreme undesirability of such a late opening needs little elaboration, though it bears specific mention that opening one month late would shorten the 1972-73

[4] Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

[5] Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969).

school year, and make it very difficult, if not impossible, for that year to include the necessary number of school days required by Maryland law and at the same time conclude within the June expiration date set forth in teachers' contracts.

A vice-president of Lambda, in charge of preparing the Lambda plan, testified that his work will not be completed, at the earliest, before November, 1972. However, he also testified that the proposed staff plan for the tenth and eleventh grades could, if made effective September 5, 1972, later be coordinated with the Lambda plan without any undue expense or complication. Thus, the fact that the Lambda plan is not yet ready does not for that reason justify delay in implementation of the staff's senior high plan.

During the hearing, more evidence was taken with regard to transportation costs than any other single item. That evidence convinces this Court that if the proposed tenth and eleventh grade plans were made effective on September 5, 1972, and all other desegregation was delayed until September, 1973, there might well be an additional cost exceeding three-quarters of a million dollars. That cost could probably be reduced to less than half of that amount if all desegregation other than of the twelfth grade were accomplished effective January 29, 1973. The tremendous additional cost would occur because Prince George's County at present busses about 75,000 school children, using 496 buses [6] which are scheduled to arrive at the schools in time for staggered opening hours from 7:30 a.m. to 9:30 a.m. Almost all of those 496 buses make as many as five consecutive trips each day, carrying as many as five separate groups of children to their respective schools. Under the proposed staff plan, as presently developed, some of the 496 buses will no longer be able to make consecutive runs.

[6] There are a total of 737 buses, 241 of which are used for special educational, athletic, spare and emergency purposes.

Therefore, those buses and their drivers would accordingly be idle during an increased amount of time.

At present, there are 1500 bus trips per day. Under the proposed senior high plan, the 496 buses would make an additional 140 trips per day, would bus about 200 students who are not now being bussed,[7] and add 7.28 miles per day to the bus miles per high school student now being transported.[8] In order to accomplish those additional trips and because of the additional periods of idleness, the drivers of those buses would have to be employed for longer hours. The cost of paying them for those hours plus the cost of driving certain additional miles will cause the above-mentioned ballooning of transportation costs, though all agree that ballooning can be decreased by trial and error, and also when the entire senior high desegregation plan goes into effect covering the twelfth as well as the tenth and eleventh grades. Additionally, both the school staff witnesses and the Lambda official testified that given time for further study the school staff itself, without outside help and without trial and error, would almost surely be able greatly to reduce the additional costs. Going further, and most importantly, the Lambda official stated that he believes that Lambda's proposals, when completed and coordinated with the plans of the school staff, will permit desegregation of the entire school system, including all twelve grades, without additional transportation expense and perhaps at a reduced total transportation cost; and without involving more than a minimum increase in the total number of students transported, in the miles each such student would be transported, and in the daily transportation time such additional transportation would require. While the courts have made it clear that delays in implementing the *Brown-Swann* standards should not be countenanced be-

[7] About 15,000 senior high school students are currently being bussed.

[8] That average is now 15 miles per day per senior high school student.

cause of increased costs,[9] those decisions have been rendered in cases in which there was no evidence that, given a short delay, a desegregation plan meeting constitutional standards could be devised and implemented which would totally or at least substantially eliminate increased costs. Further, those decisions were rendered in the context of cases which had been pending for a number of years in the courts. The within proceeding was commenced on last March 29th. Because of the cooperation of counsel in stipulating facts and in many other ways, it was possible for this Court to render as early as July 25, 1972 an opinion with regard to lack of constitutionality of the existing system. Regardless of whether or not detailed studies should have been made and detailed plans formulated prior to that time, the school staff had less than one month to formulate and present those plans for the tenth and eleventh grades by August 22, 1972. Further, Lambda is being paid $50,000 by HEW to present analyses and proposals which will not be available until at least November, 1972 and which may well cause changes to be made in the proposed school staff plan for the senior high. Bearing in mind the command of the Supreme Court in *Alexander*[10] and with full knowledge of the record of the past, this Court concludes that, in light of all of the facts and factors discussed above, including the additional transportation costs as only one of such factors, the defendants have borne their burden of showing the desirability of not implementing the staff desegregation plan for the tenth and eleventh grades effective September 5, 1972.

On the other hand, this Court holds that the defendants have not borne such burden with regard to any delay be-

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[9] *Swann* involved an increase of about $1,000,000 to a yearly school budget of about $66,000,000. And note particularly Brewer v. School Board of City of Norfolk, Virgina, 456 F.2d 943, 947 n.6 (4th Cir. 1972).

[10] See n.4, *supra*.

yond January 29, 1973 in connection with desegregation of the elementary and junior high school grades. While the shift of a large number of students among schools possibly requires concomitant faculty reassignments and may also entail certain curricular and extra-curricular changes, nevertheless, the testimony in this case indicates that even allowing time for consultation by school staff officials with Lambda so as to enable the Lambda analyses and proposals to be utilized, a complete desegregation plan for all three levels, senior high, junior high and elementary, can be completed by early December or by mid-December, 1972 and implemented by the end of January, 1973. That plan would utilize the senior high plan prepared in the last month but would permit time for it to be altered to eliminate, both with and without the aid of Lambda, any substantial increases in bussing costs, the number of students being bussed, and the number of transportation miles per day per student being bussed. Nevertheless, the defendants resist any change in mid-year, for non-transportation reasons. For one thing, they point to the need to acclimatize all concerned to student assignment changes made to achieve desegregation. It is of course true that any time a student moves from one school to another, whether it be from elementary to junior high school, or from junior high school to senior high school, or from one school to another within any of the three levels, or indeed from one city to another, careful counseling and planning are required. The burden thrown upon school administrators, faculty and counselors is immeasureably greater when massive changes are undertaken within a very large, geographically scattered system. But that awesome burden will be present whenever the change-over occurs, be it mid-year as of January 29, 1973, or in September, 1973. There was testimony that if the shift is made effective in the fall rather than in mid-year, there is time for certain human relations and counseling pro-

grams to be handled during the preceding summer. However, a quick look at the case law reveals that in other instances courts have ordered mid-year changes without any apparent serious adverse results.[11] In this case, this Court concludes that the change-over can and should be made effective January 29, 1973 with regard to the elementary and junior high schools.

The question must therefore be asked, why not also require the change-over to become effective for the tenth and eleventh graders as of January 29, 1973? The answer is that there are a number of important differences between senior high schools on the one hand, and junior high schools and elementary schools on the other hand. Although all of the educators testified that no mid-year change is desirable, all agreed that there are many less problems inherent in a mid-year change-over at the elementary level than at the high school level. For one thing, at the senior high level, there are many electives and more semester courses as opposed to year-long courses.[12] For another, the senior high school student engages in a number of athletic and other extra-curricular activities which transcend the mid-year break. And, additionally, there is the intermingling of tenth, eleventh and twelfth graders in courses and other activities which makes it harder to shift in mid-year senior high students than elementary school students. While the junior high school change-over differs only in degree from the senior high school change-over, the evidence in this case fails to disclose at the junior high level problems of the same approximate degree of intensity as

[11] Carter v. West Feliciana Parish School Board, *supra*; Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4th Cir. 1969). *See also* Clark v. Board of Education of Little Rock School District, 449 F.2d 493, 498-99 (8th Cir. 1971).

[12] Semester courses are not uniform either as to schedule or as to content in the several high schools of Prince George's County.

are apparent within the senior high context. Accordingly, defendants have not met the burden as to delay in the change-over in the junior high schools, beyond January 29, 1973, even though they have so done with regard to the senior high schools.

The Prince George's County school transportation system affords bussing for students of all ages. Accordingly, the desegregation plans for all three levels, elementary, junior high and senior high, should be coordinated and completed at one time. Such a total proposed overall plan shall be presented to this Court on or before December 4, 1972. That plan shall be based on a schedule calling for the elementary and junior high schools to be desegregated effective January 29, 1973 and the senior high schools to be desegregated effective September, 1973.[13] This Court will hold a hearing with regard thereto on Monday, December 11, 1972. In connection therewith, this Court notes that since it is not hereby ordering for implementation at this time any action by defendants "which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socio-economic status" as provided in section 803 of the Higher Education Act Amendments of 1972, Pub. L. 92-318, this Court is required neither to postpone the effective date of its within Order as provided thereby, nor to construe that section, nor to consider its constitutionality, the latter question having been reserved by counsel for plaintiffs

[13] In September, 1973, all three grades of the senior high schools, tenth, eleventh *and* twelfth, shall be desegregated. The defendants have agreed that there is not sufficient reason for the senior class to be excluded from operation of the plan if the members of that class and the school administrators and faculty know one year in advance of the change-over and can prepare for the same.

herein. However, those issues would seemingly arise during the December hearing. Counsel are therefore required to submit memoranda in connection therewith no later than October 1, 1972. Thereafter, this Court will hear oral argument during a date set in October pertaining to those issues and any other issues which can be determined prior to the December 11th hearing on the desegregation plan itself.

This case raises questions pertaining not only to assignments of students but also to the racial balances in faculty and administration as well as plans for new school construction. Counsel have agreed to submit reports to this Court by October 24, 1972 with regard to faculty and administration. Since any new school construction is expected to be coordinated with the new student assignment plan, it is not expected that the construction question will pose any new problems.

The reports and memoranda hereinabove referred to shall be submitted and filed as herein provided. It is so ORDERED, this 31st day of August, 1972.

/s/ FRANK A. KAUFMAN
United States District Judge

EXHIBIT "H"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-325-K

SYLVESTER J. VAUGHNS, JR., ET AL.,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,

Order

For the reasons stated in this Court's opinion of even date herewith, plaintiffs' motion for summary judgment is hereby granted to the extent that that motion seeks a declaration that the school system of Prince George's County does not, at the present time, meet the standards set forth in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and *Swan* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (*Swan*). Also in accordance with the said opinion, this Court holds *sub curia* all issues pertaining to the type and nature of relief which is required.

It is so ORDERED, this 25th day of July, 1972.

/s/ FRANK A. KAUFMAN
United States District Judge

EXHIBIT "I"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-325-K

SYLVESTER J. VAUGHNS, JR., ET AL.,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,

Filed: July 25, 1972

Richard V. Falcon, David S. Bogen, of Baltimore, Maryland, and Kenneth L. Johnson, Gerald A. Smith, of Baltimore, Maryland, and Alan J. Goldstein, of Oxon Hill, Maryland, for Plaintiffs.

Paul M. Nussbaum and Stanley H. Goldstein, of Mt. Rainier, Maryland, for Defendants.

Kaufman, District Judge.

Plaintiffs, black adult residents of Prince George's County, Maryland, instituted this proceeding on behalf of their school age children and other children similarly situated, invoking this Court's jurisdiction, *inter alia*, under 28 U.S.C. § 1343, the jurisdictional counterpart of 42 U.S.C. § 1983. Plaintiffs' substantive claim for injunctive and declaratory relief is stated under that latter statute and rests upon alleged violations of the standards established by the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*) and *Swan* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (*Swan*). Plaintiffs ask this Court to permit this case to be brought as a class action under Federal Civil Rule 23. Since this action falls precisely within the provisions of Federal Civil Rule 23(b)(2), this Court hereby determines that this action shall be maintained as a class

action on behalf of all black children of school age residing within Prince George's County.[1]

Plaintiffs seek summary judgment herein and point in connection therewith to an extensive and detailed Joint Stipulation of Facts filed by both sides and attached hereto. While that document speaks for itself, a few highlights culled therefrom are revealing.

Until 1954, Prince George's County (the County) maintained a dual school system, segregated by state law. *See* Md. Ann. Code art. 77, §§ 124, 207-09, 269 (1951 ed.). At the conclusion of the 1953-54 school year, the County operated a total of 95 elementary and secondary schools of which 21 were attended only by black students.[2]

After the Supreme Court of the United States declared such state-imposed racial segregation in education unconstitutional in *Brown I*, the County adopted, in 1956, a "freedom of choice" plan. Under that plan each pupil was assigned to the school he attended before the Supreme Court's decision in *Brown I* but each pupil was given the option of electing to transfer to the school nearest to where he lived or, in certain exceptional cases, to any other school.[3] The effect in practice of that "freedom of choice" plan was to maintain intact the racially segregated school system which had existed theretofore. During the 1964-65 school year, the last year in which the "freedom of choice"

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[1] Because the class is designated pursuant to Rule 23(b)(2), no notice is required by Rule 23(c)(2). For a discussion of notice requirements in class suits pursuant to Federal Rule 23, *see*, on the one hand, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Francis v. Davidson, —— F.Supp. —— (D. Md. January 28, 1972); Northern Natural Gas v. Grounds, 292 F.Supp. 619, 636 (D. Kan. 1968), as contrasted with Eisen v. Carlisle and Jacquelin, 391 F.2d 555 (2d Cir. 1968). See also 3B J. MOORE, FEDERAL PRACTICE ¶ 2355 at 1152-53 (2d ed 1969), favoring the views expressed in the first three cases that notice in a Rule 23(b)(2) case is not always required.

[2] Attached Joint Stipulation of Facts ¶ 4.

[3] Attached Joint Stipulation of Facts ¶ 5.

plan was in operation, over 82% of the County's black student population attended schools which were 100% black and over 73% of the white students attended schools which were over 95% white. Fifteen of the County's 126 elementary schools enrolled an all-black student body and three of its secondary schools, attended by 77.4% of the black pupils who were of secondary school age, remained all black schools.[4]

Beginning with the 1965-66 school year, the County adopted a pupil assignment system based upon geographic attendance zones established by its Board of Education. Under that system, a pupil attends the school located in the zone in which he lives. The geographic attendance zone plan has continued in force and effect up to and including the present time although the boundaries of most if not all of the zones have been changed from time to time.[5]

At the end of the first year in which the geographic attendance zone system was in effect, 11 schools (6.1%) in the County had student populations of 95% or more black pupils 113 schools (62.8%) had student bodies in excess of 95% white pupils.[6] In October, 1967, a report submitted to the federal Department of Health, Education and Welfare by the Superintendent of Schools for Prince George's County disclosed that, at that time, eight of the County's 199 schools enrolled an all-black student body.[7]

At the present time, the Prince George's County school system has a total enrollment of 162,828 pupils of which 22.4% are black and 77.6% are white. Sixty-one percent of the black attend schools with student bodies greater-than 50% black and 40% of the black pupils attend schools which are greater than 80% black. Forty-seven percent

[4] Attached Joint Stipulation of Facts, Exhibit 2.

[5] Attached Joint Stipulation of Facts, Exhibit 1.

[6] Attached Joint Stipulation of Facts, Exhibit 6.

[7] Attached Joint Stipulation of Facts, Exhibit 7.

of the white students attend schools which are greater than 95% white and 66% attend schools which are greater than 90% white.[8]

Against the agreed factual background in this case, defendants oppose plaintiffs' motion for summary judgment, asserting that the undisputed facts constitute "mere conclusions" and that a factual dispute concerning "causation" exists. But that dispute, to the extent it exists herein, is relevant not as to whether relief should be granted but rather as to what type of relief is required.

That conclusion is compelled by the command of *Brown I* and the implementation required by *Brown II*,[9] as well as by the doctrine of *Green* v. *County School Board*, 391 U.S. 430 (1968), which Mr. Chief Justice Burger summarized in *Swan* (at 13) as standing for the proposition that although "a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in Green required that:

> 'The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed.' Green, supra, at 439...." [Emphasis in original.]

Continuing in *Swan* (at 14) the Chief Justice wrote:

> This was plain language, yet the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities. Alexander v. Holmes County Board of Education, 396 U.S. 19, restated the basic obligation asserted in Griffin v. School Board, 377 U.S. 218 (1964), and Green, supra, that the remedy must be implemented forthwith. [Emphasis by the Chief Justice.]

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[8] Attached Joint Stipulation of Facts ¶ 15, Exhibits 9, 10, 11 and 12.

[9] Brown v. Board of Education, 349 U.S. 294 (1955).

Later, in *Swann* (at 31), the Chief Justice returned to *Green* noting that in that case the Supreme Court "used the term 'feasible' and by implication, 'workable,' 'effective,' and 'realistic' in the mandate to develop 'a plan that promises realistically to work, and . . . to work *now*.' "

Those standards command a discontinuation of the current lack of desegregation in the schools of Prince George's County. That lack stems from a pre-*Brown I* segregated system which has never been effectively dismantled and which was not, in its origin, "a consequence of other types of state action, without any discriminatory action by the school authorities" (*Swann* at 23). At the same time, this Court recognizes that the increased and continuing movement of blacks in recent years from the District of Columbia into Prince George's County has produced a growing and changing societal pattern in the latter jurisdiction.

Both sides in this case have advised this Court that the Board of Education of Prince George's County (Board) entered into a contract dated June 30, 1972, utilizing funds made available to the Board by the federal Department of Health, Education and Welfare, with the Lambda Corporation, a corporation with its principal office in Arlington, Virginia (Lambda), to make a study and a presentation to the Board with the objective "to assist Prince George's County in the development of a desegregation plan in which specified desegregation objectives are met with a minimum of student transportation."[10] The commencement date for the study was the latter part of the month of June, 1972.[11] The agreed standards underlying the development by Lambda of its plan are:

a. Students shall be assigned so that the level of desegregation reached in the basic desegregation op-

[10] Document No. 22 in official court file, page 1.

[11] Document No. 22 in official court file, page 1.

tion presented by the Lambda Corporation to the Prince George's County School Board on May 2, 1972 is achieved; and so that no school will have a majority of black students.

b. For the 1972-73 school year there will be no net increase over the average number of children bused in the 1971-1972 school year corrected for the normal increase the Board will expect for the 1972-1973 school year.[12]

In addition, the contrast also stated that "an early plan for the secondary schools [is] to be delivered" to the Board "so that it could be converted into a detailed plan for implementation by the Fall of 1972." [13]

This Court is presently informed that certain difficulties have arisen in connection with the conduct of the study which have caused delays. In that connection, Lambda has currently advised this Court and the Board that it is doubtful whether Lambda will be able to submit to the Board a plan for the secondary schools of the County in time for implementation by September 5, 1972, the date the County schools are schedule to open in the fall of this year.

However, Lambda has also advised this Court and the Board that Lambda will submit to the Board not later than August 22, 1972 a status report concerning Lambda's work under its aforesaid contract with the Board. Accordingly, the Board is hereby Ordered to file in this Court 10:00 a.m. on August 22, 1972 the said status report it receives from Lambda on that date, along with, to the fullest extent practical in view of the requirements of the Order set forth in the immediately following paragraph hereof, the Board's

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[12] Document No. 22 in official court file, page 5.

[13] Document No. 22 in official court file, page 8.

own plan for student attendance, faculty [14] and administration (the preparation of which plan the Board is hereby Ordered forthwith to commence and pursue diligently) so as to bring the Prince George's County school system into total compliance with the *Brown-Swan* standards to the fullest extent possible by September 5, 1972, or if that is not feasibly possible, then to bring that system into such compliance in part to the fullest extent possible by that date. The burden of establishing the need for any delay or delays in whole or in part shall rest upon defendants.

On a primary basis the Board is hereby further Ordered forthwith to cooperate fully and effectively with Lambda and to furnish the latter as quickly as possible without any delay all relevant data and information which Lambda requires for its study and for the formulation of its plan.

This Court will hold a hearing on August 25, 1972, at 10:00 a.m. to consider the reports due on August 22, 1972 as well as any further evidence either side desires to produce, Thereafter, this Court will file one or more further Orders designed to achieve at the earliest possible date or dates compliance by defendants with the standards of *Brown I* as enunciated in *Swan*.

It is so ORDERED this 25th day of July, 1972.

/s/ FRANK A. KAUFMAN
United States District Judge

[14] This Court has been informed by counsel for both sides that such a plan as to faculty is already in existence. Attached Joint Stipulation of Facts ¶ 47.

EXHIBIT "J"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-325-K

Sylvester J. Vaughns, Jr., ET AL.

v.

Board of Education of Prince George's County, ET AL.

ORDER

Upon consideration of the Motion to Intervene filed by Jesse Alexander Eller, et al., it is hereby, this *19th* day of September, 1972, effective as of September 1, 1972,

ORDERED, ADJUDGED and DECREED, by the United States District Court for the District of Maryland, that the Motion to Intervene shall and the same is hereby granted upon the following conditions:

1. Intervenors are satisfied with the limited rights accorded to their counsel during the proceedings which took place in this Court from the time of the filing of the Motion to Intervene and the time of the filing of this Court's opinion on August 31, 1972.

2. Intervenors will in no way attempt to delay any future hearing in this case. Further, the intervenors agree they will interpose no objection to evidence being presented in any form or by any procedure agreed to by counsel for plaintiffs and defendants and approved by this Court.

3. If it shall appear that the testimony of any witness called by intervenors to testify in this case can be expected to cause substantial additional costs or expenses, the question of whether the intervenors shall be required to give satisfactory

assurances of their financial ability to pay such costs and expenses in the event it shall be determined by a court having jurisdication in the premises that they should do so, will be argued and ruled upon by this Court prior to the taking of such testimony.

4. If the intervenors desire to note an appeal or file petition for certiorari or other review from any order in this case filed by any court having jurisdiction in the premises, they shall so advise counsel for plaintiffs and defendants in advance of such filing. In addition, intervenors hereby agree that if they so advise counsel for plaintiffs and defendants, counsel for plaintiffs or counsel for defendants, or both, shall have the opportunity to oppose the noting of such an appeal or the filing of such a petition for certiorari or other review, and, in addition, the opportunity to seek to present to a court having jurisdiction in the premises the question of whether intervenors shall be required, in advance of noting such appeal or such petition, to give satisfactory assurances of their financial ability to pay such costs and expenses as may be incurred by the prosecution of such appeal or such petition.

5. The pleading entitled "Motion for New Trial, Motion to Reopen the Record, Petition for Reconsideration, and Alternatively, Petition for Clarification," filed by intervenors is accepted by the Court as an amicus filing as of September 8, 1972 and shall be afforded no other status. In addition, unless this Court's order of July 25, 1972 is reversed in whole or in part by the United States Court of Appeals for the Fourth Circuit, the intervenors shall not seek to present to this Court any evidence, testimonial or documentary, other than that which was presented to this Court by joint stipulation of the parties prior to July 25, 1972 and made a matter of record herein, relating to the issue of compliance or non-compliance with the standards of *Brown I*, *Brown II*, and *Swann*, as opposed to evidence relating to questions pertaining to type and timing of relief. Intervenors shall of course have the opportunity to present such latter type of evidence subject to the provisions of this Order.

6. Counsel for the parties have orally informed this Court that the within Order, and each and every one of its terms and provisions, is fully and completely acceptable to them and to their respective clients.

7. The Clerk is directed to send a copy of this Order to Richard V. Falcon, Esq., one of counsel for plaintiffs; Paul M. Nussbaum, Esq., one of counsel for defendants; and Richard A. James, Esq., counsel for intervenors.

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United States District Judge

EXHIBIT "K"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-325-K

Sylvester J. Vaughns, Jr., ET AL.
Plaintiffs

v.

Board of Education of Prince George's County, ET AL.
Defendants

MOTION TO INTERVENE

Comes now your Petitioners, Jesse Alexander Eller and Martha Street Eller, of 12003 Gordon Avenue, Beltsville, Maryland 20705, Brendan Edward Lynch and Marjorie Elaine Lynch, of 13229 Ronehill Drive, Beltsville, Maryland, 20705, Kenneth Phillip Whittemore and Bette Ann Whittemore, of 4004 Hillwood Court, Beltsville, Maryland 20705, Arthur Emanuel Dinerman and Janet Avin Dinerman, of 3609 Chase Terrace, Beltsville, Maryland 20705, Morris Edward Sampson and Thelma Olinda Sampson of 13223 Ronehill Drive, Beltsville, Maryland 20705, William Raymond Leer and Margaret Street Leer, of 4003 Hillwood Court, Beltsville, Maryland 20705, Leo Paul Chabot and Wanda Maxine Chabot, of 4010 Stoconga Drive, Beltsville, Maryland 20705 and John Eugene Spaulding and Bernadine Lane Spaulding, of 4011 Stoconga Drive, Beltsville, Maryland 20705 by and through their attorneys, Nanna and James, and respectfully request this Honorable Court to allow the above named individuals to intervene as party plaintiffs, under Rule 24 (a)(2) of the United States Federal Court. The Petitioners state for reasons that:

1. The original plaintiffs are black adult residents of Prince George's County, having school age children in the public

schools of Prince George's County, Maryland. That the original plaintiffs brought suit under Federal Civil Rule 23.

That your Petitioners are non-black adult citizens of the United States of America, Prince George's County, and taxpayers, having school age children in the public schools of Prince George's County, who also represent a class under Federal Civil Rule 23.

2. That your Petitioners represent unto this Honorable Court that they, on behalf of their children, will be bound by any judgment in the above action. The Petitioners further represent unto this Honorable Court that their interest is being inadequately represented by the present plaintiffs or the present defendants in the above case.

3. That your Petitioners position is evidenced by the fact that as of August 22, 1972, no plan has been approved by the Prince George's County Board of Education to comply with the Order of Court dated July 25, 1972.

That your Petitioners would request an opportunity to submit a de-segregation plan to this Honorable Court which would adequately protest their interests. That the present plaintiffs purpose is to achieve racial balance in the Prince George's County Public Schools through mass bussing. That your Petitioners propose to achieve racial balance through minimal bussing.

4. That although the Petitioners would cause a delay in the present suit, your Petitioners represent that this delay would not adversely effect either the original plaintiffs nor the original defendants. That the school year in Prince George's County is to begin on September 5, 1972, without a present plan for de-segregation, and to implement a plan during the school year or at any other time would cause no more hardship and expense than to implement a plan at the present time.

That under Public Law 92-318, 92nd Congress, s. 659, June 23, 1972, any plan which involves massive bussing is prohibited.

5. That any massive bussing plan is a denial of the constitutional rights of those students bussed.

6. That your Petitioners request that they be allowed to present to this Honorable Court both questions of law and fact which have not been presented in the present suit, and are necessary to protect the interest of said Petitioners.

WHEREFORE, your Petitioners respectfully pray:

1. That they be permitted to intervene as party plaintiffs pursuant to Rule 24, Section 2 of the Rules of Civil Procedure for the United States District Court.

2. That no final determination be made in this cause until such time as the Petitioners shall have had an opportunity for discovery and the opportunity to submit a plan for the Court's consideration to achieve racial balance in the Prince George's County schools and to engage experts to support such plan.

Respectfully submitted

Date: August 23, 1972

By_____
Emmett H. Nanna, Jr.

_____
Richard A. James
Attorneys for Petitioners

POINTS AND AUTHORITIES

Rule 24(a)(2) of the Federal Rules of Procedure.
Pellegrino vs. Nesbit, 203 F 2nd 463.

EXHIBIT "L"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 72-325-K

Sylvester J. Vaughns, Jr., ET AL.
Plaintiffs

v.

Board of Education of Prince George's County, ET AL.
Defendants

MEMORANDUM OF LAW

Comes now your Petitioners, Jesse Alexander Eller and Martha Street Eller, of 12003 Gordon Avenue, Beltsville, Maryland, 20705, Brendan Edward Lynch and Marjorie Elaine Lynch, of 13229 Ronehill Drive, Beltsville, Maryland, 20705, Kenneth Phillip Whittemore, and Bette Ann Whittemore, of 4004 Hillwood Court, Beltsville, Maryland, 20705, Arthur Emanuel Dinerman and Janet Avin Dinerman, of 3609 Chase Terrace, Beltsville, Maryland, 20705, Morris Edward Sampson and Thelma Olinda Sampson, of 13223 Ronehill Drive, Beltsville, Maryland, 20705, William Raymond Leer and Margaret Street Leer, of 4003 Hillwood Court, Beltsville, Maryland, 20705, Leo Paul Chabot and Wanda Maxine Chabot, of 4010 Stoconga Drive, Beltsville, Maryland, 20705, and John Eugene Spaulding and Bernadine Lane Spaulding, of 4011 Stoconga Drive, Beltsville, Maryland, 20705, by and through their attorneys, Nanna and James, respectfully submit this Memorandum of Law in support of their motion to intervene.

Statement of the Case

This proceeding involves a challenge to the validity, under State and Federal laws, of the Prince George's County public school system. Plaintiffs, black adult residents of Prince George's County in the State of Maryland with school age children in the public schools of Prince George's County, on behalf of their school age children and other children similarly situated, seek injunctive and declaratory relief upon alleged violations of the standards established by the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*) and *Swan* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (*Swan*). The Court, based upon "an extensive and detailed Joint Stipulation of Facts filed by both sides" (*Mimeo* p. 2), issued an opinion on July 25, 1972, ordering the Board of Education (Board), the defendant herein, to submit to this Court on August 22, 1972, the so-called "Lambda plan for the secondary schools of the County" as well as "the Board's own plan for student attendance, faculty and administration (the preparation of which plan the Board is hereby ordered forthwith to commence and pursue diligently) so as to bring the Prince George's County school system into total compliance with the *Brown-Swan* standards to the fullest extent possible by September 5, 1972, or if that is not feasibly possible, then to bring that system into such compliance in part to the fullest extent possible by that date." [footnote omitted, *mimeo* p. 8]

Pursuant to the Court's order, a meeting of the Board was held on August 21, 1972.[1] At this meeting, the Board

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[1]The public was permitted to attend that meeting, but was not permitted to participate therein. Additionally, a full disclosure of the agenda of that meeting was withheld from the public (see unanswered letter from George P. Lewnes to Honorable Colonel Chester Whiting dated August 11, 1972, attached hereto as Appendix A). All that was ascertainable from the news media was that the Board was going to convene in response to the Court's order.

considered a plan that would require massive busing of school children throughout Prince George's County.[2] That plan, however, was rejected by the Board on a four to four vote. (One member of the Board was not present at the time that votes were called-for). No other plan was considered by the Board and no instructions, to our knowledge, were given to Board's counsel as to the position he was to take before this Court in this proceeding. It is our understanding, however, that the Board, in conformity with this Court's order, submitted to the Court on August 22, 1972, its report on its meeting together with the plan rejected by it.

Our petition to intervene was filed with the Court on August 23, 1972.

Argument

Rule 24 of the Federal Rules of Civil Procedure provides for intervention, both as a matter of right and as a matter of discretion. The first section of Rule 24 provides:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statue of the United States confers an unconditioned right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter injure or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In the event the party seeking to intervene does not qualify as of "right," Section (b) of Rule 24 permits intervention as a matter of judicial discretion:

> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States

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[2]It is our understanding that the plan was presented to the Board for the first time on the day of the meeting.

> confers a conditioned right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In this proceeding, Petitioners are justified to intervene under either section of Rule 24.[3] The critical tests for intervention under Rule 24(a) is (1) whether applicant has "an interest relating to the property or transaction which is the subject of the action;" (2) whether applicant is so situated that "the disposition of the action may as a practical matter impair or impede his ability to protect that interest;" and (3) whether the interest of the applicant is "adequately represented by existing parties." We believe and submit that there can be no argument as to Petitioners' compliance with tests (1) and (2) above.[4] We shall show that Petitioners also meet test (3); that their petition was timely filed; and that they have a statutory right to intervene.

Additionally, joinder of the instant Petitioners is needed for a just adjudication as required under Rule 19 of the Federal Rules of Civil Procedure cited below in part:

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[3]In our motion to intervene, we relied solely on Rule 24 (a) (2). However, after a further and more thorough analysis, we will show herein that our intervention is also dictated by subsection (1) of 24 (a) as well as permitted under Section (b) (1) and (2) of Rule 24.

[4]Petitioners are non-black adult citizens and taxpayers of Prince George's County having school age children attending public schools of Prince George's County. They bring this action on behalf of their children and school children similarly situated, who will be bound by any judgment rendered by this Court in this action. Accordingly, this Court should find, as it found for the original Plaintiffs, that Petitioners' "actions falls precisely within the provisions of Federal Civil Rule 23 (b) (2) . . . [and] shall be maintained as a class action on behalf of all [non-] black children of school age residing within Prince George's County" (Court's order, *mimeo* pp. 1-2).

(a) Persons to be Joined if Feasible.

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest or . . . .

The instant Petitioners individually and as a class are indeed indispensable parties to the instant suit and their joinder is necessary. Although there is "no prescribed formula for determining in every case whether a person is an indispensable party or not . . . "[5] the test most often cited and relied upon is set forth in *Shields* v. *Barrow,* 17 How. 129, 139 (1854) where the Supreme Court defined the indispensable parties as:

> Persons who do not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

In other words, "where a person will be directly affected by a decree, he is an indispensable party . . . ." *Williams* v. *Bankhead,* 19 Wall. 563, 571 (1874).

As more fully set forth in these Petitioners' Motion to Intervene, the rights of said Petitioners will be directly affected and may be seriously and permanently injured by a decree of this Court.

Parties have been held to be indispensable because their "rights . . . are so entangled with one another that it is

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[5] *Niles Bement-Pond Co.* v. *Iron Molders Union,* 254 U.S. 77, 80 (1920).

practically impossible in the decree to protect those who are absent,[6] and because the decree would be of "immediate concern" to them.[7]

Finally, denial of Petitioners' Motion to Intervene would constitute denial of due process and equal protection under the constitution in that said Petitioners would be precluded from invoking the protective mantle provided by Section 803 of Public Law 92-318, to wit:

> Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

Petitioners' Interest Are Not Adequately Represented By Any Party To This Proceeding

Petitioners here will urge the Court to find that the existing plan, which was "accepted as meeting the requirements of Title VI of the Civil Rights Act of 1964" by the Department of Health, Education and Welfare (HEW),[8] is a valid school plan under the criteria of *Brown* and *Swan*. The original Plaintiffs herein urge otherwise.

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[6] *Roos* v. *The Texas Co.*, 23 F.2d 171, 173 (2nd Cir. 1927), cert den., 277 U.S. 587 (1928).

[7] In *State of Texas* v. *Interstate Commerce Commission*, 258 U.S. 158 (1922).

[8] HEW's letter of November 19, 1972, to Mr. William S. Schmidt is attached hereto as Appendix B.

Defendant, on the other hand, has not urged in our opinion the validity of the existing plan adequately, if at all, to the Court. For instance, the Joint Stipulation of Facts does not contain any reference to HEW's letter (Appendix B) that its plan conforms to the requirements of the 1964 Civil Rights Act. Additionally, the Stipulation does not reflect the fact that, *if* segregation exists in any of the schools (and we do not concede that it does), its existence is the result of housing patterns and *not* the result of retention, in any form, of the previously unlawful dual school system that predated *Brown I*.

Defendant did not bring those facts to the attention of the Court and, consequently, we no longer can assume that the Court will be made aware of those, and other relevant facts that are needed by it to render a proper determination herein. Accordingly our position was not *adequately* represented by Defendant in the prior proceedings held before this Court[9] and, because of the Board's four-to-four rejection of the massive busing plan, there appears to be little, if any, likelihood that our position will be urged before this Court by Defendant in the subsequent proceedings. We could give specific additional details of the errors, and/or omissions of facts in the Stipulation, which we propose to correct when admitted as a plaintiff-intervenor. However, for the sake of brevity, we will not set forth those additional details, at this time, but instead will note that the Court, based on that Stipulation, concluded in its opinion that recial imbalance exists in a number of the County's schools. We believe, however, that when the Stipulation is corrected to reflect the full facts, the racial imbalance if any, found by the Court will not be the result of a *de jure*

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[9]Petitioners had every right to anticipate that Defendant's position in this proceeding was to actively urge the validity *in toto* of the Board's existing plan and, thus, our position would have been adequately represented.

situation, but rather the result of factual exigencies, which are *de facto* in nature and permissible under constitutional criteria.[10]

Petitioners' Motion to Intervene Is Timely Filed

As shown above, the motion to intervene was filed two days after the Board's meeting held in conformance with the Court's order. Up to that point, the proposal before this Court was the existing plan, which these Petitioners support. Further, up to that time, Petitioners had every reason to believe that their position was actively and wholeheartedly supported by Defendant particularly in light of HEW's letter of complete compliance referred to earlier. It was not until after the Board rejected the massive busing plan and refused to instruct its counsel relative to the existing plan that the rights of these Petitioners become know to them as being inadequately represented before this Court. Accordingly, we submit that our motion is timely filed and, as shown above, should be granted under Rule 24(a).

However, even should the Court disagree with our position stated above, we submit that our motion to intervene should be considered by the Court as being timely filed. A delay in moving to intervene does not require a denial of a motion to

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[10]The Court should not misconstrue Petitioners' position to mean that we, in any way, countenance segregation in the County's school system. We specifically and unequivocally reject segregated schools established on the basis of any preordained determination. It is our understanding that the existing plan is based on a valid, systematic geographical determination without any recourse to "gerrymandering" tactics. If our understanding is in error, we will urge the Court to rectify the "gerrymandered" area, but in no way, will we advocate busing as the solution. A redrafting of the geographical areas is all that will be required to rectify any "gerrymandered" area, assuming *arquendo* that the evidence shows that such an area exists within the County's school system. The Stipulation, however, does not give any insight on this area of relevant consideration.

intervene once it is made. "It is *undue* delay . . . which will require a denial . . . [emphasis in original]." *Wooten* v. *Moore*, 42 F.R.D. 236, 241 (E.D.N.C., 1967). And whether or not there has been undue delay is a function, not of elapsed time since the filing of an action, but rather one of prejudice to existing parties. As aptly stated by the court in *McDonald* v. *E. J. Lavino Co.*, 430 F. 2d 1065, 1073 (CA5, 1970):

> The most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene . . . In fact this may be the *only* significant consideration when the proposed intervenor seeks intervention of right. As one commentator has noted: "the courts are in general agreement that an intervention of right under Rule 24(a) must be granted unless the petition to intervene would work a hardship on one of the original parties.

Similarly, in BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, (Supp. 1970) §594, the authors state:

> In the exercise of this discretion (in determining the timeliness of intervention) the court of course will consider the time element itself but it will evaluate it in the light of all the circumstances of the case. The most important factor is whether any delay in moving for intervention will prejudice the existing parties to the case.

Where, as here, the Court will not have before it facts that are essential for its proper evaluation of the propriety of the existing plan, it is submitted that permitting Petitioners to intervene in this proceeding will not cause any prejudice or hardship on the existing parties. Unless, of course, the existing parties will allege that they will be prejudiced by the Court having all of the relevant facts before it rather than only an eclectic and slanted version thereof. Further, we do not anticipate that our intervention will cause any undue delay in

this proceeding. In fact, after a reasonable opportunity to gather material and review the record made to date, we will be prepared to move expeditiously in concluding this record and submitting it to Your Honor for decision. We submit that such procedure cannot cause any hardship or prejudice on any of the participants. To the contrary, *all* of the citizenry of Prince George's County will have been provided due process of law.

Petitioners Have A Statutory Right to Intervene

On June 23, 1972, President Nixon signed into law an Act entitled "Education Amendment of 1972" (Public Law 92-318, 92nd Congress, S. 659) referred to previously. That Act provides, *inter alia*, for the intervention of parents in Court proceedings where the Court has ordered busing or is seeking to implement its busing order. (Section 804). While this case has not reached the specific posture of a court-ordered busing proceeding, it would appear that that possibility exists. If that possibility eventuates, hundreds and possibly thousands of parents may seek to intervene and re-open the record under that section of the statute. Their right to do so is unequivocal. Denial of their petitions would then be contrary to the moratorium on busing enacted by Congress. We submit that a proper reading of this Act requires the Court at this time to permit our intervention. Any other ruling would defeat that provision of the Act and will inevitably result in a confused and choatic situation.

Conclusion

Due to the shortness of time to prepare this memorandum we have not had full opportunity for more specificity. Nevertheless we submit that for all of the foregoing reasons, and those stated in our petition to intervene, Petitioners respectfully move this Court to grant them the right to intervene and participate fully as plaintiffs in this proceeding.

Respectfully submitted,

By_____
Emmett H. Nanna, Jr.

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Richard A. James
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August, 1972, copies of the aforegoing Memorandum of Law were mailed, postage prepaid, to Paul M. Nussbaum, Esquire, 3723 34th Street, Mt. Rainer, Maryland, 20822, and to Richard V. Falcon, Esquire, 500 West Baltimore Street, Baltimore, Maryland

By_____
Richard A. James